99

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~129~~ 159

THE NATIONAL BANK OF GENESEE, PLAINTIFF IN ERROR,

vs.

EDWARD M. WHITNEY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JUNE 11, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 429.

THE NATIONAL BANK OF GENESEE, PLAINTIFF IN ERROR,

vs.

EDWARD M. WHITNEY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1 Supreme court, State of New York.

At an adjourned special term of the supreme court, held at the court-house, in the city of Buffalo, on the h day of August, 1874.

Present, Hon. Charles Daniels, justice.

2 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY, EBENEZER M. McCormick, and others.

The referee's report of sale having been filed in the above-entitled action, and the same having been confirmed, from which it appears there is a surplus paid into court arising from the said sale, on reading and filing affidavit and notice of claim by Ebenezer M. McCormick to such surplus moneys, or some part thereof, by virtue of a lien thereon, under a junior mortgage given by defendant, Edward M. Whitney, on motion of Taggart & Day, of counsel for said Ebenezer M. McCormick, it is ordered that it be referred to W. W. Rowley, of Buffalo, N. Y., counsellor at law, as a referee to ascertain and report the amount due to said Ebenezer M. McCormick, or to any other person, which is a lien upon such surplus moneys and as to the priority of the several liens thereon.

And it is further ordered that such referee summon before him on this reference every party who has appeared in this action, and every person who has delivered written notice of his claim to such surplus moneys; that he cause them to have the usual notice of all subsequent proceedings, and report thereon with all convenient speed.

(Copy.)

C. A. HULL, *Clerk.*

3 Supreme court, Genesee County.

MARIA CROCKER
vs.
EDWARD M. WHITNEY, EBENEZER M. McCormick, and others.

To the supreme court of the State of New York:

In pursuance of an order of this court made in the above-entitled action, bearing date the 8th day of August, 1874, by which it was referred to the undersigned, among other things, to ascertain and report the amount due to said Ebenezer M. McCormick, or to any other person, which is a lien upon the surplus moneys paid into court arising from the sale of real estate in the said action as to the priority of the several liens thereon. I do respectfully report—

That on the 28th day of August, 1874, all the parties who had appeared in the action, and all the parties who had filed written notice of their claims to such surplus moneys, duly appeared before me, who thereupon, after having the usual oath of referee duly administered, proceeded to a hearing of the said matters.

That I was attended by John R. Olmsted as attorney, and L. N. Bangs as counsel for Edward M. Whitney, Joshua Lathrop, and

4 John P. P. Lathrop, and by Myron H. Peck for Homer Bostwick, and by Messrs. Taggart & Day for Ebenezer M. McCormick, and by Seth Wakeman for the National Bank of Genesee, and by Messrs. Tarbox & Sherwin for John W. Mix.

The amount of such surplus moneys is $3,889.80, as appears by the certificate of the treasurer of the county of Genesee hereto annexed as exhibit.

First. That all of the parties above named introduced their claims hereto annexed and made proof thereof, which is hereto annexed, forming part of this report, and I find the facts as stated therein to be, that all the liens or incumbrances are upon the same premises which were sold in this action. That the claimant, the National Bank of Genesee, was chartered under the national banking act, passed in 1864, in the month of May, 1865, and is still doing business under such charter.

That on the 12th day of January, 1871, Edward M. Whitney, the owner and mortgagor of the premises sold in this action, made, executed, and delivered a mortgage, dated on that day, to the said National Bank of Genesee, conditioned and intended as security for the payment of $5,000, one year from its date, to be held by said bank as collateral security for the payment of all notes at that time held by said bank against said Whitney, and for any other indebtedness of said Whitney then due or thereafter to become due.

That such mortgage was duly recorded the 19th day of September, 1872, in liber of mort. 71, p. 372.

5 That at the time said mortgage was given, Whitney was actually indebted to the bank only in the sum of $3,200.

That after such mortgage was given, Whitney continued to do business with the bank, of which the bank kept but one account in which the indebtedness of $3,200 secured by the mortgage was entered.

That from December, 1870, to October 1st, 1872, Whitney deposited about $17,000 in drafts, which were placed to his credit, and also procured notes to be discounted by the bank and placed to his credit; that all such credit went into his general open account; that said Whitney was indebted to said claimant, National Bank of Genesee, on the 18th day of June, 1874, in the sum of $5,160.10, and no part of such indebtedness has been paid; that the same was made up by renewals of former liabilities, some part of which extend back to May, 1872; that the bank holds no security for this indebtedness other than the above-mentioned mortgage; that the bank also holds two notes made by Whitney and endorsed by H. Bostwick, one for $740 and the other for $635.

Second. That the claimant Homer Bostwick holds a mortgage given by said Edward M. Whitney to said Homer Bostwick, bearing date September 16th, 1872, recorded same day at 12 m., in liber 71 of mort., p. 369, in Genesee County clerk's office, conditioned as follows:

6 "As security for the payment of any and all liabilities and indebtedness that has already or hereafter may be incurred by the said Homer Bostwick for and on account of the said Edward M. Whitney, either by indorsement or otherwise, to an amount not exceeding $2,500."

That at the time such mortgage was given the National Bank of Genesee held two notes made by Whitney and indorsed by Bostwick, one for $700, the other $600, both maturing the following month.

That these notes have not been paid, but have been renewed from time to time, and now with some little accumulation are represented by the two notes introduced in evidence by said claimant, each bear-

ing date January 2d, 1874, signed by Whitney and indorsed by claimant, one for $740 and the other $635, and both due thirty days from date.

That at the time such mortgage was given, the First National Bank of Batavia held two other notes made by Whitney and indorsed by claimant, one for $500 and the other for $700.

That these notes have not been paid, but have been renewed from time to time, and now with some accumulations are represented by the note introduced in evidence by claimant, bearing date May 28, 1874, made by Whitney and indorsed by claimant for $1,228.97, due in thirty days from date; that said three notes are held by the said two banks respectively, and are past due and remain unpaid; that the claimant is liable thereon as indorser.

7 Third. That the claimant Ebenezer M. McCormick holds a mortgage given by said Edward M. Whitney to said claimant, bearing date September 16th, 1872, recorded same day at 1.3-4 p. m., in liber 71 of mort., page 370, in Genesee County clerk's office, conditioned as follows: "For the security for the payment of any and all liabilities and indebtedness that has already or hereafter may be incurred by the said Ebenezer M. McCormick for and on account of the said Edward M. Whitney, either by indorsement or otherwise, to an amount not exceeding $1,500."

That at the time such mortgage was given the said claimant was liable as indorser upon two notes made by Whitney, one of $500, payable at the National Flour City Bank of Rochester; the other of $1,000, payable at the First National Bank of Batavia; that the note of $500 was paid February 4th, 1873, from the proceeds of a new note made by Whitney and indorsed by claimant for $530, payable at the First National Bank of Batavia; that subsequently Whitney paid on this note $100, and that the balance, viz, $430, has been renewed from time to time, and is now represented by the note introduced in evidence, bearing date May 28th, 1874, for that amount made by Whitney and indorsed by claimant; that the $1,000 note has not been paid, but has been renewed from time to time, and with some accumulations is represented by the note introduced in evidence, bearing date May

8 28th, 1874, for $1,034.30, made by Whitney and indorsed by claimant; that these two notes are held by the First National Bank of Batavia, are past due and remain unpaid; that the claimant is liable thereon as indorser,

Fourth. That claimant John W. Mix has a judgment by confession in supreme court duly entered and docketed in the Genesee County clerk's office on the 13th day of February, 1873, for $1,234.83 against said Edward M. Whitney; that Whitney has paid the interest on this judgment, but no part of the principal has been paid.

Fifth. That the claimants Joshua and John P. P. Lathrop hold a mortgage given by said Edward M. Whitney to the claimants, bearing date April 3d, 1873, recorded April 4th, 1873, in liber 73 of mort., p. 129, in Genese County clerk's office, for $1,586.78.

That said mortgage was given to secure the bond of said Whitney, of same date, conditioned to pay said sum one day after date; that the whole amount is due with interest from April 4th, 1873, and is wholly unpaid.

Sixth. That claimant John P. P. Lathrop holds a judgment by confession in the supreme court, duly docketed in Genesee County clerk's office, on the 3d day of April, 1873, for $1,046.42, against Edward M. Whitney; that no part thereof has been paid.

Seventh. That said Edward M. Whitney is insolvent, and has no property with which to pay his debts.

9 From the facts so found I find as matters of law and report:

That the mortgage given by Whitney to the National Bank of Genesee was valid as security only for the existing indebtedness of Whitney to the bank at that time, viz, $3,200. (See National Banking Law of 1864, sec. 28, Kansas National Bank of Topeka vs. Rowell, second Dillon, Cir. Rep., 371.)

That such indebtedness of $3,200, for which said mortgage was given to secure, has been fully paid and satisfied. (Tuscott vs. King, 6 N. Y., 147.)

The debt was the principal thing, the mortgage but incident to it; when the debt became paid the mortgage was extinguished and could not be revived as security for other advances. (Meed vs. York, 6 N. Y., 449.)

Therefore I find that the National Bank of Genesee has no claim or lien upon the surplus moneys in this action.

That the mortgage held by Bostwick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $2,500.

That the mortgage held by McCormick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $1,500. It is true that neither of these mortgagees,

10 Bostwick or McCormick, have advanced or paid anything for the mortgagor. These mortgages are not given to indemnify against damages arising from indorsement, &c., in which case the mortgagees would undoubtedly have to pay before they could recover upon the mortgages, but they are given to secure a specific thing, viz, liability incurred. The moment these mortgagees were charged as indorsees upon their respective notes, their liability was fixed, and to indemnify them against such liability is precisely for what the mortgage was given, and they each are entitled to the full benefit of their mortgage without regard to the fact whether they have actually sustained damage or not. (Rockfiller vs. Donnelly, 8 Con., 633; Gilbert vs. Wiman, 1 N. Y., 561; Bancroft vs. Winspear, 44 Barb., 209.)

The liens of these mortgages are not defeated by the fact that the notes upon which they are at present liable as indorsers were given subsequent to the recording and docketing of the other claimant's mortgage and judgment.

Without passing upon the question whether the recording a mortgage or docketing a judgment is of itself notice to a holder of a prior recorded mortgage, the present liabilities of the mortgagees, Bostwick and McCormick, is for the same identical debt for which they were liable when the mortgages were given. The renewal of these respective debts did not impair the security of the mortgagees even as against bona fide subsequent incumbrancers of whose liens they had actual notice before such renewal. (Hilliard on Mort., vol. 1, p. 485; Bank of Utica vs. Finch, 3 Barb., ch. 203.)

11 In the testimony hereto annexed will be found some evidence showing that the several liabilities of Bostwick and McCormick are void on the ground of usury; such testimony is introduced and the question raised by a mortgagee and judgment creditors, whose liens are subsequent to those of Bostwick and McCormick. Their position is such that they cannot attack those liabilities in that manner. That the mortgagees cannot, see Bixford vs. Widger, (2 N. Y., 131;) Chamberlin vs. Dempsey, (36 N. Y., 149.)

The case in 2 N. Y. was where the mortgagee sought to set aside a prior incumbrance on ground of usury, but is none the less an authority in this case, for, since the statute of 1837 relating to usury, a party who can successfully defend on that ground can with like success maintain an action to set such prior lien aside without offering to refund the amount actually paid, with one exception which does not enter into this case. I should have no doubt about this question were it not for the case The Mutual Life Insurance Co. vs. Bowen (47 Barb., 618), cited by claimant's counsel, which holds squarely with them and contrary to Rixford vs. Widger; but as the latter case is superior in authority it must control.

A judgment creditor who has not perfected his lien by an execution sale stands in no better position. The cases all hold with one exception, viz: Post against Bank of Utica, 8 page, 639, which was
12 overruled. Same case on appeal, 7 Hill, 381. That the creditor must have his title perfected under the execution sale before he is in position to plead usury. (Dix vs. Van Wyck, 2 Hill, 522; Opinion of Judge Daniels in Mason vs. Lord, 40 N. Y., 487 and 81.) In other words, he must possess the whole interest of the judgment debtor's before he can set up such defence.

A judgment when docketed is simply a lien upon all the lands of the debtor, the same as the mortgage is a lien upon the lands embraced in it; neither carries with it an estate in lands. Usury is a personal defence, and can be set up only by parties or privies; there may be privies in blood or privies in estate. A judgment creditor or mortgagee before sale occupy no such relation; if they do it can be only by privity of estate; such an interest is only created by assignment. Bingham on Real Estate, p. 407 and 8, says: "Privity of estate does not reach persons who have required an interest in any way except by assignment." No estate in lands passes to the mortgagee; he has but a chattel interest. (Kortright vs. Cady, 21 N. Y., 343.)

The whole estate remains in the mortgagor subject to the lien of the mortgage. The mortgagee out of possession is not an assignee. (Astor vs. Hoyt, 5 Wend., 603.)

I know that the language used by judges in many decisions upon this question seem to include mortgagees, and any one holding a lien upon the property as equally entitled to the defence of usury as are heirs, devisees, legatees, grantees, &c.; but there is a marked differ-
13 ence. Devisees and grantees, though strangers in blood, succeed to the whole interest of the devisor or grantor, and thus become privies by estate, and by necessity assume all the covenants running with the land. Now it cannot be said that a mortgagee out of possession can be held upon the covenants running with the land, which he undoubtedly would be if there was a privity of estate. (Walton vs. Crowly, 14 Wend., 63.)

The same reasoning will apply to a judgment creditor before sale. The purchaser, under a sale by foreclosure or execution, succeeds to the whole interest of the mortgagor or debtor, embracing all his right to the real estate, and including all the burdens running with the land; in other words, he stands in privity by estate with him, and then only can he set up the defense of usury to a prior lien.

As the respective liens of Bostwick and McCormick are more than enough to absorb all the surplus moneys, it is unnecessary to consider the liens of subsequent claimants.

I do find and report that the claimant Homer Bostwick, under and by virtue of the mortgage executed to him by said Edward M. Whitney,

is entitled to $2,500 of such surplus moneys, and that the claimant Ebenezer M. McCormick, under and by virtue of the mortgage executed to him by said Edward M. Whitney, is entitled to the balance of such surplus monies, and that there is no lien or claim thereon prior to said Bostwick's mortgage, and that said McCormick's mortgage is a lien next to said Bostwick's mortgage.

W. W. ROWLEY,
Referee.

BUFFALO, *October* 6, 1874.

14 *Exhibit first.*

Supreme court.

MARIA F. CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

I hereby certify that there is deposited in my hands as county treasurer three thousand eight hundred and eighty-nine dollars and eighty cents surplus money in the above-entitled action.

HIRAM K. BUELL,
County Treasurer.

Supreme court.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

Notice is hereby given that I am entitled to the surplus moneys arising from the sale made on the 25th day of July, 1874, of the premises described in the above-entitled action, to the amount of fourteen hundred and seventy-two dollars.

15 That such claim exists by virtue of a certain mortgage executed by said Edward M. Whitney to me, which mortgage bears date the 16th day of September, 1872, and was recorded in Genesee County clerk's office in liber 71 of mortgages, at page 370, on the said 16th day of September, 1872, and was executed and delivered as security for the payment of any and all liabilities and indebtedness incurred or to be incurred by me for and on account of the said Edward M. Whitney by indorsement or otherwise to an amount not exceeding fifteen hundred dollars.

That such indorsements have been by me made of two promissory notes given by said Whitney to the First National Bank of Batavia, N. Y., amounting with interest to the said sum of fourteen hundred and seventy-two dollars, which sum I am liable to pay.

Batavia, July 27, 1874.

E. M. McCORMICK.

Filed July 27th, 1874. Refiled July 28th, 1874.

16 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

Take notice that the undersigned claim to be entitled to the surplus

moneys, or a part thereof, arising on the sale made in this action on the 25th day of July, 1874.

The claim of the undersigned is for the sum of twenty-five hundred dollars by virtue of a lien upon said premises, under a mortgage given by defendant, Edward M. Whitney, while he was the owner of the equity of redemption in the said mortgaged premises, and before the commencement of this action, which said mortgage bears date on the 16th day of September, 1872, and was recorded in the clerk's office, of said county of Genesee, on said last mentioned day, at 12 o'clock m., in liber 71 of mortgages, at page 369, and the lien thereof as aforesaid is claimed by the undersigned to be next in priority after the mortgage of the plaintiff upon and by virtue of which said premises were sold in this action.

Dated August 21st, 1874.

Yours, &c.,

HOMER BOSTWICK,
Mortgagee,
By M. H. PECK, *Attorney.*

To C. A. HULL, Esq.,
Clerk Genesee County.

17 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

Take notice that The National Bank of Genesee, of Batavia, is entitled to the surplus moneys, or a part thereof, arising on the sale in this action on the 25th day of July, 1874.

The claim of the said The National Bank of Genesee, of Batavia, is for five thousand three hundred and two dollars and forty-eight cents, for money heretofore lent to said Whitney at divers times by said bank, by virtue of a mortgage dated January 12th, 1871, executed by E. M. Whitney to the said National Bank of Genesee, of Batavia, to secure the payment of five thousand dollars and interest, and recorded in the Genesee County clerk's office, in book of mortgages, No. 71, at page 372, and which said mortgage was given by said defendant, Edward M. Whitney, while the said Edward M. Whitney was the owner of the equity of redemption in the mortgaged premises, and before the commencement of this action, which lien is next in priority after the mortgage of the plaintiff in this action.

Dated July 28, 1874.

H. U. HOWARD,
President National Bank of Genesee.

To C. A. HULL, Esq.,
Clerk of Genesee County.

Filed July 28th, 1874.

18 Supreme court.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

SIR: Take notice that John W. Mix, one of the defendants in the above entitled action, claims the surplus moneys arising from the sale

of the mortgaged premises in this action, which, after payment of plaintiff's debt and costs, amounts to the sum of $3,8[illegible]9.80 by virtue of a lien thereon, under a judgment recovered in the supreme court against the mortgagor, Edward M. Whitney, for the sum of $1,241.86 damages and costs, while the said Edward M. Whitney was the owner of the equity of redemption in the said premises and before the commencement of this suit, which lien is next in priority to mortgage of the plaintiff. The said judgment was docketed in the Genesee County clerk's office, February 13th, 1873, and the whole amount is still due and unpaid.

Batavia, , 1874.

H. F. TARBOX,
Attorney for John W. Mix.

To C. A. HULL.

19 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY, JOSHUA LATHROP, JNO. P. P. Lathrop, and others, defendants.

SIR: Take notice that Joshua Lathrop and John P. P. Lathrop, defendants above named, claim the surplus moneys arising from the sale of the mortgaged premises in the above entitled action, which, after paying the plaintiff's debt and costs, amount to the sum of $3,889.80 by virtue of a lien thereon, under a mortgage given by the defendant, Edward M. Whitney, to the said Joshua Lathrop and John P. P. Lathrop, on the 3d day of April, 1873, for the sum of $1,586.78, and while the said Edward M. Whitney was the owner of the equity of redemption in the mortgaged premises and before the commencement of this suit, and which said mortgage was recorded in the clerk's office of Genesee County, on the 4th day of April, 1873, in liber 73 of mortgages, at page 129, and which lien is next in priority after the mortgage of the plaintiff; the whole amount of which said mortgage is still due and unpaid with interest from the date thereof.

Le Roy, July 30, 1874.

JOHN R. OLMSTED,
Att'y for the Def'ts,
JOSHUA AND J. P. P. LATHROP.

To C. A. HULL, Esq.,
Clerk of Genesee County, N. Y.

Filed August 3, 1874.

20 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY, JOSHUA LATHROP, JOHN P. P. Lathrop, and others, defendants.

SIR: Please take notice that John P. P. Lathrop, one of the defendants in the above entitled action, claims the surplus moneys arising from the sale of the mortgaged premises in the above action, which, after paying the plaintiff's debts and costs, amount to the sum of $3,889.80 by virtue of a lien thereon, under a judgment recovered in the supreme court against the mortgagor, Edward M. Whitney, for the sum of

$1,046.42, damages and costs, while the said Edward M. Whitney was the owner of the equity of redemption in the mortgaged premises and before the commencement of this suit; which lien is next in priority after the mortgage of the plaintiff. The said judgment was docketed in the clerk's office of Genesee County, April 3d, 1873, and the whole amount of which judgment is still due and unpaid with interest.

Le Roy, July 30th, 1874.

JOHN R. OLMSTED,
Att'y for Def't,
JOHN P. P. LATHROP,
Le Roy, N. Y.

To C. A. HULL, Esq.,
Clerk of Genesee County, N. Y.

Filed August 3d, 1874.

21 Supreme court.

MARIA CROCKER
vs.
EDWARD M. WHITNEY, EBENEZER M. McCormick, and others.

AUGUST 28TH, 1874—10 a. m.

John Olmsted, attorney, appears for Edward M. Whitney.
Homer Bostwick by Myron H. Peck, attorney.
Ebenezer M. McCormick by attorney, Messrs. Taggart & Day.
The National Bank, Genesee, by Seth Wakeman.
Joshua Lathrop and John P. P. Lathrop by J. R. Olmsted, attorney, and L. N. Bangs as counsel.
John W. Mix by Messrs. Tarbox & Sherwin.
Taggart & Day for defendant.

McCormick offered in evidence the judgment roll, also referee's report of sale and certificate of Genesee County treasurer annexed, showing the amount surplus money, viz, three thousand eight hundred and eighty-nine dollars and eighty cents, dated July 25th, 1874; also mortgage bearing date September 16th, 1872, and recorded same day at 1 3-4 o'clock p. m., given by Edward M. Whitney to Ebenezer M. McCormick for fifteen hundred dollars conditional as follows: "For
22 the security for the payment of any and all liabilities and indebtedness that has already or hereafter may be incurred by the said Ebenezer M. McCormick for and on account of the said Edward M. Whitney, either by indorsement or otherwise, to an amount not exceeding $1,500;" which said mortgage is marked Exhibit A.

Defendant, EBENEZER M. MCCORMICK, sworn for moving party, says:

I became liable on certain notes given by Edward M. Whitney as the indorser. The notes offered in evidence are as follows:

$1,034.30.] BATAVIA, *May 28th*, 1874.

Thirty days after date I promise to pay to the order of E. M. McCormick one thousand and thirty-four and thirty one-hundredths dollars at the First National Bank of Batavia. Value received.

(Signed) E. M. WHITNEY.

(Indorsed on the back:) E. M. McCormick.

Under and below the end I hereby waive presentation, demand of payment, and notice of non-payment of within note.
Batavia, June 30th, 1874.

E. M. McCORMICK.

Note produced and marked Exhibit B.

23 $430.] BATAVIA, *May 28th*, 1874.

Thirty days after date I promise to pay to the order of E. M. McCormick four hundred and thirty dollars at the First National Bank of Batavia. Value received.

(Signed) E. M. WHITNEY.

(Indorsed on back:) E. M. McCormick.

Under and below same waiver of protest as on preceeding note.
Note produced and marked Exhibit C.

These notes were made to raise money with for renewing former notes that had been in bank. The money was raised for Whitney at the time I took the mortgage above set out. I had no knowledge or information of the mortgage to the National Bank of Genesee, executed by Whitney, which is mentioned in search annexed to judgment roll No. 4.

The prior notes, for which these two notes were given, were in amount just fifteen hundred. There was one hundred dollars paid on such prior notes; the odd dollars over and above $1,400, in the two in evidence, was given for interest which had accumulated.

24 Cross-examined:

The two notes for which these were given were one for $500 and one for $1,000. I have forgotten their date, but they bear date thirty or sixty days prior to these two; think it was thirty days prior. These two notes are still held and owned by the First National Bank of Batavia, and are unpaid. Mr. Whitney paid the $100 that was paid. I have never paid anything on these notes.

Redirect examination:

The original notes were given the first part of summer, 1872, and before the mortgage was given. One was given to First National Bank of Batavia of $1,000, the other the National Flour City Bank of Rochester.

(Claimant, Mr. Olmsted, attorney, objects to any evidence by parol to prove the contents of written instruments, or to any evidence of prior notes without their being produced.)

Q. Have the $1,500 notes, existing at the time the mortgage was given, been continued by renewals from time to time down to these present notes?

(Objected to by Mr. Olmsted on same ground as above, that the notes should be produced.)

A. They have been, except the $100 paid.

25 Cross-examined:

The two notes given when mortgage was given: one was payable at Flour City Bank, Rochester, $500; the other at First National Bank, Batavia, $1,000. I suppose the note at Flour City Bank was paid by Mr. Whitney. I can't tell when the $1,000 note payable at First National Bank, Batavia, was dated, or when it was due. It would have matured within thirty or sixty days from the time it was given. I can't

tell exactly how long this note was given before the mortgage. It might have been a month or only a day or two before, or it might have been the same day; I can't tell. I know the Flour City Bank note was taken up with the proceeds of a renewal note made by me. I know that I was sued on that note, and that Mr. Pardee discounted the renewal note for the purpose of paying that. I did not see it paid. I have indorsed for Whitney several renewal notes; can't tell how many, but they run from thirty to sixty days. Sometimes they would run over the time. I indorsed whenever he called upon me to renew. I think all my indorsements run either thirty or sixty days.

Cross-examined by Mr. WAKEMAN:

I have indorsed for Whitney for several years. Can't tell when I first became liable to First National Bank of Batavia. I think I was on his paper all the time, or pretty much all the time, for many years; but I can't tell how much I was on when these notes were given. I had no knowledge of the National Bank of Genesee mortgage at the
26 time I took my mortgage. I heard in some way that Mr. Bostwick was the indorser at the National Bank of Genesee for Whitney. I had indorsed for Whitney some time, and I was anxious to get off from everybody's book. I asked Whitney if he would not get some one else to indorse as I wanted to quit indorsing. He replied that he was getting a loan, and that when he got that he would not need any indorsements, and that he wanted me to continue until he got that loan. He said if anything happens so that I can't meet my paper at any time, I will secure you the first thing. Upon that statement I continued to indorse, hoping he would get the loan and I would get through indorsing, but it seemed he was getting more than less. I kept indorsing. The first knowledge I had of the mortgage given me was that he told me he had given me the mortgage and left it at the clerk's office. He told me at the same time that he had given Bostwick a mortgage. He said that Mr. Bostwick's was recorded ahead of mine, mine next, and the National Bank, Genesee, mortgage next. He said that Mr. Howard had been to him at his house and requested him to take out the Bostwick and my mortgage so that his, the bank mortgage, could be recorded first, but that he told him he could not do it; that he had no right to.

Cross-examined by Mr. PECK:

I think it was the 5th day of November, 1872, that Whitney first told me of having given a mortgage to me and having put it on record. It was at this time that he told me about Bostwick's mortgage and
27 about Howard's mortgage. He did not tell me when it was given, but that the bank, Genesee, mortgage was given before mine and Bostwick's, and that was the first I had heard of either of the three mortgages.

Cross-examined by Mr. OLMSTED:

The note of $500 to Flour City Bank was protested, and I was sued on it, and it was paid, and this mortgage from Whitney was given to secure the payment of this note which was in existence at that time at the date of the mortgage.

Redirect examination by TAGGART & DAY:

Whitney had previously agreed to give me a mortgage at two different times before his telling me he had given it and before the date of the mortgage.

E. M. McCORMICK.

Evidence introduced on part of Homer Bostwick, claimant.

A mortgage dated September 16th, 1872, given by Edward M. Whitney to Homer Bostwick upon the same lands and premises described in the foreclosure suit, consideration $2,500, conditioned as follows: "As security for the payment of any and all liabilities and indebtedness that has already or hereafter may be incurred by the said Homer Bostwick for and on account of the said Edward M. Whitney, either by indorsement or otherwise, to an amount not exceeding $2,500."

28 Acknowledged the same day and recorded at 12 o'clock m., in Genesee County clerk's office, in liber 71 of mortgage, page 369. The same marked Exhibit D.

AUGUSTUS N. COWDIN, sworn as a witness for Homer Bostwick, says:

I am cashier of National Bank of Genesee, and have been such cashier since 1865. I know Edward M. Whitney and Homer Bostwick. On the 16th day of Sept., 1872, there was held and owned by the bank one note of $700 and another of $600, made by E. M. Whitney and indorsed by Bostwick; they were made at different dates; the 700 became due the 5th and 8th October; it was thirty days' paper; the $600 note became due the 6th and 9th October; think it was thirty day' paper; the indebtedness represented by these two notes has never been paid, nor any part of it; the bank has two notes for such indebtedness; the two notes produced; they cover the same indebtedness as above; one note is for $740; it represents the same amount as the $700, with accumulations; it has been gradually increasing; the other note of $635 represents the same amount as the above $600 note with accumulations. I am acquainted with the handwriting of all the parties to these notes; the signatures are genuine.

29 $740.] BATAVIA, *June 2d*, 1874.

Thirty days after date I promise to pay to the order of myself, seven hundred and forty dollars at the National Bank of Genesee. Value received.

(Signed) E. M. WHITNEY.

(Indorsed:) E. M. Whitney, H. Bostwick.

This note was protested by me when it became due and Mr. Bostwick had notice.

$635.] BATAVIA, *June 2d*, 1874.

Thirty days after date I promise to pay to the order of Mr. Bostwick six hundred and thirty-five dollars at the National Bank of Genesee. Value received.

(Signed) E. M. WHITNEY.

(Indorsed:) H. Boswick.

This note was duly protested by me and Mr. Bostwick charged as indorser.

No part of the indebtedness represented by these notes has been paid. Said two notes received in evidence marked E and F respectively.

(Mr. Olmsted moves to strike out all the evidence of witness Cowdin relating to the indebtedness secured by the mortgage anterior to the date of these two notes that have been put in evidence.

30 Mr. Peck objects to its being thus stricken out.)

The bank does not hold any other notes made by Whitney and indorsed by Bostwick.

Cross-examined by Mr. OLMSTED:

These two notes exceed the two original notes by $75; I can't say positively whether the bank has taken more than 7 per cent. upon the renewal of any of these notes for the indebtedness secured by the mortgage. For the year past we have charged Whitney only 7 per cent. Previous to that time I cannot say. Very likely we did charge more. I think that previous to the last year we charged Whitney on all his renewals more than 7 per cent. Cannot say the rate of exchange in addition to 7 per cent. Think it was ¼ per cent. in addition to the 7 per cent. for thirty days.

(Mr. Peck objects to all the foregoing evidence relating to the percentage taken on the renewals of Whitney's paper as incompetent and immaterial.

Mr. Wakeman objects to same evidence, that it covers all the demands held by the National Bank of Genesee.)

Witness says that the two notes introduced were given in place of two notes which preceded them. Both of those notes matured June 2d, 1874. One was for $740 and the other $635. The sums of $40 and $35 were added at different times as it accumulated. On some occasions Mr. Whitney paid the interest, and when he did not it was added to the note. Whatever exchange was charged was either paid or added to note.

31 (Same objection as above by Mr. Peck to last answer.)

Redirect examination by Mr. PECK:

I have no recollection of the fact that any amount of exchange over 7 per cent. was ever added to or paid on these notes. I think it was since August, 1873, that we have not taken any exchange by the bank on any of Whitney's paper.

Cross-examined by Mr. OLMSTED:

I am not as certain that exchange was charged in every case of renewals of Whitney's paper prior to August, year ago, as I am that no exchange has been charged since that date. I cannot recollect any instance of having not charged exchange on renewal of Whitney's paper prior to August, 1873. My best recollection is that prior to August, 1873, we did charge Whitney exchange on his renewals at the rate of ¼ per cent. for thirty days.

Witness means to say that my best impression is that we did take exchange from Whitney on renewals prior and to August, 1873.

A. N. COWDIN.

LEVANT C. MCINTYRE, called by Bostwick, being duly sworn, says:

I am cashier of First National Bank of Batavia, and have been for about six years. I know E. M. Whitney and Homer Bostwick. On the 16th of September, 1872, our bank held and owned some paper made by Whitney and indorsed by Bostwick to the amount of
32 $1,200. There were two notes; one of $500, the other $700. The $500 note matured September 7th. Previous to that the indorser had been duly charged. The $700 note matured September 25th. This note was discounted for the benefit of Whitney. No part of this indebtedness has been paid. The bank holds one note of $1,200, made by Whitney and indorsed by Bostwick. For this indebtedness note produced, copy of which is as follows:

$1,228.97.] BATAVIA, *May 28th*, 1874.

Thirty days after date I promise to pay to the order of H. Bostwick, twelve hundred and twenty-eight ninety-seven one-hundredths dollars, at the First National Bank of Batavia, value received.

(Signed) E. M. WHITNEY.

(Indorsed:) H. Bostwick.

(Written thereunder as follows:)

For value received I hereby waive notice of protest and demand of payment on the within note.

June 17, 1874.

H. BOSTWICK.

Marked Exhibit G.

This note is now owned by the bank. No part of it has been paid. The bank does not hold any other note made by Whitney and indorsed by Bostwick. This note covers the same indebtedness represented by the two notes held by the bank September 16th, 1872. The addition of $28.97 represents unpaid interest accumulated since that date.

33 (Objected to by Mr. Olmsted.

The same objection and motion to strike out as was to evidence of Cowdin.)

Cross-examined by Mr. OLMSTED:

The notes of September 16, 1872, have been renewed by various renewals since that date.

Q. In these renewals, or any of them, has the banker charged a rate of exchange in addition to 7 per cent. interest?

(Objected to by Mr. Peck as irrelevant and incompetent.)

A. It is my impression there has been no such exchange charged since that date. The note immediately preceding this note was for same amount. I first find the addition of $28.97 in note due March 24, 1874.

Redirect examination by Mr. PECK:

On some of the renewals Mr. Whitney paid the exchange; and the amount of $28.97 represents the sums. He did not pay at different times.

Cross-examined by Mr. OLMSTED:

On the notes indorsed by McCormick there has not been any exchanged since September 16th, 1872, down to May 28th, 1874. Such is my impression.

L. C. McINTYRE.

EDWARD M. WHITNEY called by Mr. Peck, and being duly sworn, says:

34 I am one of the defendants in this action, and mortgagor named. I have heard the testimony of Mr. McIntyre and Cowdin. The indebtedness spoken of by them was mine, and Bostwick was accommodation indorser. I am insolvent. Have no property out of which my debts may be collected. I have no means or ability to take up this paper.

(This evidence objected to by Mr. Olmsted, and moves to strike it out as incompetent.)

I transacted the business with the bank myself. In reference to this

paper indorsed by Bostwick, part of the notes that were in existence September 16th, 1872, I have. I am ready and willing to produce them. All that I have.

Proceedings adjourned till September 2d, 9 a. m.

SEPTEMBER 2D—9 A. M.

Parties appeared same as before.

E. M. WHITNEY recalled by Mr. Taggart.

Notes shown witness.

I have made search for all the notes given for this debt called the McCormick papers. These notes are part of them. All of them were given me by the bank. These are all I can find. I have made careful search for the missing ones and cannot find them. I suppose them destroyed. I have knowledge of destroying some. One note on hand to Flour City Bank, Rochester, Sept. 11th, 1872, paid February 4th, 1873, indorsed by McCormick; marked Exhibit 1.

35 This is the note that was secured and spoken of by McCormick.

One note dated May 3d, 1873, at thirty days, for $530, paid June 5th, 1873; indorsed by McCormick; marked Exhibit 2.

One note dated February 19th, 1874, at thirty days, $430; indorsed by McCormick; paid; marked Exhibit 3.

One note March 23d, 1874, at thirty days, for $430; indorsed by McCormick and paid; marked Exhibit 4.

One note dated April 25th, 1874, at thirty days, for $430; indorsed by McCormick and paid; marked Exhibit 5.

One note dated April 8th, 1873, at thirty days, $1,000; indorsed by McCormick; paid; marked Exhibit 6.

One note dated May 10th, 1873, at thirty days, $1,000; indorsed by McCormick; paid; marked Exhibit 7.

One note dated June 12th, 1873, at thirty days, $1,000; indorsed by McCormick; paid; marked Exhibit 8.

One note dated July 15th, 1873, thirty days, $1,000; indorsed by McCormick; paid; marked Exhibit 9.

One note dated February 19th, 1873, at thirty days, for $1,034.30; indorsed by McCormick; paid; marked Exhibit 10.

One note dated March 23d, 1874, at thirty days, for $1,034.30; indorsed by McCormick and paid; marked Exhibit 11.

One note dated April 25th, 1874, at thirty days, for $1,034.30; indorsed by McCormick; paid; marked Exhibit 12.

36 These notes since September 30th, 1872, have been paid only by renewals. The notes falling due between September 16th, 1872, and September 30th, 1872, were met by me either by renewal or paid by me. Before September 30th, I ordinarily paid my notes instead of renewing. The note marked Exhibit 1 was paid by discounting a note of $530 at First National Bank at Batavia. All the notes since September 30th have been paid by renewals. The note marked Exhibit 1 was one of the existing notes for which the mortgage was given.

By Mr. WAKEMAN:

On this 16th September, 1872, McCormick was liable as indorser on my paper for $1,500, and he was liable for that amount at the time he took the mortgage as an indorser; but the paper was not due.

By Mr. BANGS:

When the $1,000 note was discounted at First National Bank last,

prior to September 16, 1872, I paid ¼ per cent. beyond 7 per cent. for thirty days. There was no exchange paid after September 30th, 1872. When the $530 was renewed in February, 1873, I discounted the note, took a draft on New York, and paid ¼ per cent. rate of exchange. At one time after, in May or June, 1873, on the renewal of this note, I paid ⅛ per cent. over the rate of 7 per cent. for renewal for thirty days. This was the only time I recollect of.

Q. Of the notes that were endorsed by Bostwick, at the National Bank of Genesee, and renewed from time to time, was any rate beyond 7 per cent. paid by you?

37 (Objected to by Mr. Peck as incompetent and immaterial; and second, that it is not proper on the cross-examination of this witness at the present time.)

A. On all paper before September 30th, 1872, I did pay ¼ per cent., and did not after that date.

(Mr. Taggart moves to strike out the evidence of witness relating to paying any rate above 7 per cent. on the McCormick papers, on the ground that it is immaterial and irrelevant; second, also, that it is improperly offered on cross-examination of his witness.

Mr. Bangs objects to have it struck out.)

By Mr. TAGGART:

The last note for $1,000, given before September 16th, 1872, indorsed by McCormick, was not given to renew a prior note. This is my best recollection.

E. M. WHITNEY.

By Mr. Wakeman:

Offers in evidence a mortgage dated January 12th, 1871, recorded September 19th, 1872, liber 71, page 372. "This grant is intended as security for the payment of the sum of $5,000 one year from the date of this instrument, with interest thereon. This mortgage is made and executed as a collateral security to the party of second part named therein, for the payment of all notes which it may hold against the party of the first part herein named, or for any other indebtedness now due or may hereafter become due."

38 Mortgage given by Edward M. Whitney to the National Bank of Genesee, and marked Exhibit K. This mortgage on same premises as previous mortgages.

By Mr. Wakeman:

Offers as witness HAYDEN U. HOWARD, who, being sworn, says:

I am president of National Bank of Genesee. On the 12th day of January, 1871, Mr. Whitney was indebted to the bank $3,200 on notes. Part of it was indorsed and part not. Note shown witness dated June 18, 1874, for $5,160.10, at three months after date, with interest, signed by E. M. Whitney. Note offered in evidence, which is as follows:

$5,160.10.] BATAVIA, *June 18th*, 1874.

Three months after date I promise to pay to the order of National Bank of Genesee, five thousand one hundred and sixty and ten one-hundredths dollars, at the National Bank of Genesee. Value received, with interest.

(Signed) E. M. WHITNEY.

This note is unpaid and is owned by the bank. Marked Exhibit No. 1.

The bank also holds two notes indorsed by Bostwick, made by Whitney. Copies of which are given in testimony of A. N. Cowdin. This $5,160.10 note was given on renewal of former liabilities of Whitney; one of which is note, dated February 15, 1873, at forty-five days, for $3,077.50 with interest. Signed E. M. Whitney; payable to his own order; indorsed by him; marked Exhibit N'. 2.

39 One note dated February 15, 1873, at forty-five days, for $1,618.67, with interest, payable to his own order, and indorsed by himself; marked Exhibit No. 3.

A note dated April 4th, 1873, at thirty days, for $4,758.78, with interest, payable to his own order, and indorsed by himself; marked Exhibit N'. 5.

This was given to pay and take up two preceding notes.

A note dated May 2d, 1873, at one month after date, for $4,800, payable to the order of National Bank Genesee, with interest. Signed E. M. Whitney; marked Exhibit No. 5.

This note was given to pay the last above described note.

A note dated June 10th, 1873, at two months after date, $4,830 80, with interest, payable to order of National Bank of Genesee; marked Exhibit No. 6.

This was given to pay the last above note.

A note dated August 13th, 1873, at two months, for $4,800, payable to order of National Bank, Genesee, with interest; marked Exhibit No. 7.

This was given to renew the note last above in part.

A note same date, at ten days, for 89.97 with interest, payable same as last above; marked Exhibit No. 8.

This note was gived to renew in part the note second above.

A note dated October 16th, 1873, at two months, $4,858.80, to order of National Bank Genesee, with interest; marked Exhibit No. 9.

This was given to take up the note above of Exhibit N'. 7.

40 A note dated January 12th, 1874, at two months, for $4,800, payable to order of National Bank Genesee; marked Exhibit No. 10.

A note same date, at two months, for $268.45, payable to order of National Bank Genesee; marked Exhibit No. 11.

These two notes were given to pay and renew the note marked Exhibit No. 9, and may include other indebtedness.

Upon examination of my books I find that the indebtedness at January 12th, 1871, of Whitney was $3,800, and it was all indorsed by Bostwick. I don't think we have the possession of any notes given by Whitney prior to the ones in evidence, or the notes that made up the indebtedness of $3,200, January 12th, 1871.

Cross-examined by Mr. PECK:

This note of June 18th, 1874, of $5,160.10 covers all the indebtedness of Whitney to the bank on commercial paper, except the two Bostwick notes. My impression is that a portion of the paper held by bank January 12th, 1871, was indorsed by Bostwick.

Cross-examined by Mr. BANGS:

The two notes of February 15th, 1873, cover all the unindorsed notes of Whitney at that date owing the bank, the National Bank of Genesee.

Became purchaser of the mortgaged premises on sale under foreclosure, and took conveyance of the same.

41 Redirect examination by Mr. WAKEMAN:

The custom of the bank is to deliver up the notes when renewed to the maker prior to January 12th, 1871. None of Whitney's notes given prior to that date are in the bank that I am aware of. I have had conversation with Bostwick in reference to his indebtedness to the bank as Whitney's indorser. He spoke about the mortgage given him by Whitney, and said that Whitney told him he was protected by the mortgage given to bank. He spoke to me about two or three times. It was previous to September 16th, 1872.

Q. Why did you not record your mortgage from Whitney when you received it?

(Objected to by Mr. Peck on ground that it is immaterial and incompetent.)

A. Mr. Whitney requested me not to put it on record as it might injure his credit.

(Mr. Peck moved to have the last answer stricken out as immaterial. Mr. Wakeman objected.)

Cross-examined by Mr. PECK:

It is impossible for me to fix the time when Mr. Bostwick spoke to me about the bank mortgage. It was in his office I spoke to him about his indebtedness, and expressed some uneasiness about it. When the knowledge of Bostwick's mortgage came to me I then thought over the conversation, and remembered that the time of it was previous to the giving the mortgage to Bostwick. There was no particular diffi-
42 culty with Whitney's transactions previous to the 16th September, 1872. There was more difficulty a short time previous to September 16th, 1872, than on the 12th January, 1871. He was more in debt. There were no proceedings instituted against Whitney till the last of September, 1872. I don't remember any other conversations with Bostwick we had at the time spoken of. I don't know as there was anything said as to whether the bank mortgage was on record between me and Bostwick. I remember I expressed the opinion that the mortgage to me was no security to him. The first I heard of Bostwick's mortgage was just about the time they were left there for record. I took my mortgage to record, and they had been left there the day previous. In my talk with Bostwick the mortgage was mentioned expressly.

Cross-examined by Mr. BANGS:

From my knowledge I am unable to state whether the indebtedness of $3,800 has been reduced. One amount of $1,000 I have traced back to May, 1872. This is part of the $5,160.80 note. Whitney was in the habit of bringing in defendant's paper at different times, which were received and credited to his account; and notes was discounted from time to time and credited to his account, and his notes paid from time to time and charged to his account. The National Bank of Genesee was chartered under the national banking act passed in 1864, and it is still doing business under that charter. It was organized in May, 1865. There was no advancement money on account of the mortgage. At the time it was given and executed all the advances had been made on notes, drafts, or other securities.

43 Re-direct examination by Mr. WAKEMAN:

On the giving the mortgage when there was an indebtedness of $3,800, all secured by Bostwick's indorsement, there was a new note given by Whitney without Bostwick's indorsement, but it represented the same indebtedness. Prior to September 30th, 1872, this debt of

$5,160.80 originated. At the time it was made only 7 per cent. was taken, but subsequently on renewals ¼ per cent. was taken sometimes. The aggregate amount of notes on which ¼ per *per* cent. was taken is $6,900, and the further amount of $7,025 on which same rate of exchange is taken—all renewals.

By Mr. PECK:

Shortly after January 12th, 1871, Mr. Bostwick ceased to indorse for Whitney for some time, but prior to August, 1872, Bostwick commenced indorsing his paper at thirty and sixty days, and continued to be such indorser till present time. We took ¼ per cent. exchange on some of this paper indorsed by Bostwick.

By Mr. BANGS:

On the renewal of Whitney's paper, indorsed by Bostwick, the aggregate of renewals was $2,740, on which was charged ¼ per cent. in addition to 7 per cent. since August, 1872; and these two notes the bank holds now had its origin in this paper.

Redirect examination by Mr. WAKEMAN:

The note preceding the one given in evidence as of date June 18th, 1874, was dated March 12th, 1874, due three months from date for $4,800. Signed by E. M. Whitney.

H. U. HOWARD.

44 E. M. WHITNEY recalled by Mr. Bangs:

I understand my indebtedness to the Bank of Genesee was reduced in January, 1872, to two notes, one of $600 and one of $500. In my business transactions with the bank, drafts were drawn by me and transferred to the bank, for which the bank gave me credit. Such drafts were drawn on my consignees. I was engaged in making flour and shipping to eastern market. I also made deposits of cash in same bank during the same time; I was also in habit of discounting notes at the bank during this time and they were credited to my account. The notes I had maturing from time to time in this bank were charged up to my account, by reason of my having funds in bank. The notes when matured would be charged up, and when I wanted to use the money I would renew the notes again. I borrowed money elsewhere and deposited in bank against which these notes were charged up. My indebtedness at no time since January 12th, 1871, has been less than $1,100 to the bank. As I understand the two notes of $600 and $500, existing in 1872, January, have been paid at times and subsequently discounted. In the spring of 1872 I purchased large amounts of grain and floured it and sent it East, drew against it and deposited such drafts in bank, which were credited to my account. My practice has been to pay up a debt before making another. The two notes of $500 and $600, above mentioned, were merged in my general banking account. Don't think they have been specially continued.

Reference adjourned until Sept. 5th, 9 a. m.

45 SEPTEMBER 5TH—9 A. M.

Parties appeared same as before.

Mr. WHITNEY recalled by Mr. Wakeman:

I have examined my account with the bank more accurately. The notes of $600 and $500 made in Jan., 1872, and formerly spoken of, have

been fully paid. The note dated January 20th, 1872, for $504, drawn at thirty days and due February 19th and 22d. On the 22nd of February I find a note of $500 at thirty days would be due 23d and 26th of March. There is no note of either last date renewing that, but there is a note of March 22nd for $500 at thirty days, due April 21st and 24th. April 24th I find a note of $500 at thirty days, due May 24th and 27th. Then I find a note of May 25th of $1,000 at thirty days, due June 24th and 27th. Also another note May 25th of $1,000, due in forty-five days, due July 9th and 12th; and of one of these two notes I regard the note of $500 as being paid. It was paid out of the avails of these notes.

On January 29th, 1872, note of $600, due thirty days, February 26th and 29th. February 29th, a note at thirty days of $600, due March 30th and April 2d. On April 2d note at thirty days of $300, due May 2d and 5th. I can't find any renewal of this note. I find from January 9th, 1872, up to May, and even later, they had several drafts of large amount discounted and placed to my credit. On the 2d April, 1872, I am credited by draft of $500. I do understand the two notes of January, 1872, of $500 and $600 to have been paid.

46 By Mr. OLMSTED:

On December 10th, 1870, my account with National Bank of Genesee, commencing on that day and ending September 20th, 1872, amounted to $96,226.77. This is the only account that I kept and it shows the amounts given to my credit from time to time. It was made up from drafts, discounts of notes and cash deposits from other sources.

By Mr. WAKEMAN:

On September 20th, 1872, I am charged with balance $10.49. I suppose the bank held paper against me during all the time above account was running.

E. M. WHITNEY.

H. U. HOWARD recalled by Mr. Wakeman:

January, 1872, the bank had maturing against Mr. Whitney $3,750 of that particular paper, consisting of two notes of $500 each, one of $350, one of $600, one of $1,200, another of $600, making $3,750. In May the account was $4,225. I think all the indebtedness of January was renewed. I find $4,500 in March. I February it was $2,700. I do not suppose the amount indebtedness has been reduced. These statements are made from book of record of bank, in which we keep a statement of all bills discounted.

By Mr. BANGS:

During the time from December, 1870, to October, 1872, there were about $17,000 drafts given by Whitney to bank. These were
47 time drafts. All the discounted paper went into his general account. The above statement show what there was maturing in said months. There was more or less of it sixty-day paper. I think at the time mortgage was given, January 12th, 1871, the indebtedness that Whitney owed the bank was $3,200. We also discounted a note of $600 on that day, which makes the $3,800 included in my former statement. The $600 note was discounted under the mortgage as collateral. The $3,200 indebtedness was not kept distinct, but it was merged in other amounts from time, but it all appears in the note of $5,760.80. There may have been small notes paid, but the great body of it is in last mentioned note. There has been no distinct account kept of

the $3,200 indebtedness. The whole account has been kept in open account. I presume the larger part of the $17,000 drafts was passed to Whitney's credit in his account.

H. U. HOWARD.

Mr. WHITNEY recalled by Mr. Bangs:

During my account with the bank I had sight drafts discounted by the National Bank of Genesee. I frequently procured drafts to be discounted at other places, the proceeds of which were placed to my credit at National Bank Genesee. These drafts were occasionally of considerable amount.

E. M. WHITNEY.

L. C. MCINTYRE recalled by Mr. Taggart:

I have examined the books of First National Bank of Batavia regarding the notes for which the $1,000 which was in bank September
48 16th, 1872, was given. The first note of Whitney indorsed by McCormick was dated May 4th, 1872, for $1,000. This note matured June 16th and was paid 17th. Can't say how the record shows it to be paid. The next note, June 21st, 1872, $1,000, at thirty days, matured July 24th and paid 29th by renewal, dated July 27th, for thirty days, for $1,000, due August 29th, paid by a new note given September 28th, 1872, at thirty days, $1,000. The note due August 29th was the note held by bank on Sept. 16th, 1872. The note has been continued by renewals until present time. All indorsed by McCoimick. My impression is that since the 21st of June, 1872, no rate of exchange has been charged on any of those notes greater than 7 per cent.; and since the 16th September no rate of exchange has been charged greater than 7 per cent., I think.

I think that no rate of exchange greater than 7 per cent. has been at any time taken on the $530 note, which originated in the Flour City Bank, Rochester, and carried by us.

By Mr. OLMSTED:

I do not remember a single instance when we took exchange on the $1,000. I do not recollect a single instance when we took exchange on the $530 note. I know that there was no exchange taken on this last note. I would not say positively that we did not on any of the $1,000 notes.

Q. Was it not the custom of your bank previous to September 30th, 1872, to charge exchange on discounting paper in addition to 7 per cent.?

49 (Objected by Mr. Day.)

A. Not in all cases. Can't say it was a general rule. We did in some cases.

L. C. MCINTYRE.

Mr. WHITNEY recalled:

On every renewal of the $1,000 note prior to September 30, 1872, I paid ¼ per cent. exchange on thirty days' renewal beyond 7 per cent. interest. On the renewal of the $530 note in May or June, 1873, I had a conversation with Mr. McIntyre and Mr. Pardee, and Mr. McIntyre asked Mr. Pardee how much they should charge me. He replied ⅛ per cent.. which I paid at that time in addition to the 7 per cent.

(This evidence of Whitney was objected to by Mr. Day before it was taken, on the ground that it is incompetent and immaterial.

Second. That the same ground had already been gone over.)

E. M. WHITNEY.

Evidence introduced by Mr. Tarbox in behalf of Mr. Mix.

Transcript of judgment dated February 13th, 1873. Damages, $1,234.83, in favor of John W. Mix against Edward M. Whitney, marked Exhibit W.

Mr. TABBOX called and duly sworn.

By Mr. BANGS:

I was the attorney by whom this judgment was perfected. It was by confession. The judgment was for a note of $1,200, dated July
50 18th, 1872, made by Edward M. Whitney, payable to order of John W. Mix, and indorsed by him, at sixty days from date. This note was paid by Mr. Mix giving his note to bank for same amount payable to order of Mr. H. Monell, and indorsed by him three months from date; subsequently renewed by note at sixty days by same parties, then renewed by note made by Mix and indorsed by E. M. Whitney, and renewed in same form from time to time, which is now held by the bank.

H. F. TARBOX.

(Mr. Olmsted objects to any proof of last above claim on ground that no proof claim was filed in reference thereto with the clerk, and that there was no appearance in the action in reference thereto.)

Mr. WHITNEY recalled by Mr. Olmsted:

I know the note which Mr. Tarbox referred to. I am the indorser on it. I have paid the discount on it every time it has been renewed since July 14th, 1873, when I became indorser; and I think I have paid the discount on it since the judgment was rendered. The purpose of the note was to carry along the judgment. The only difference is we have reversed our positions on note. I paid the cost of obtaining the judgment. When I indorsed the note Mr. Mix said that the bank required an indorser, and that my name would answer the rules of the bank. I regarded it that the bank considered Mix good for it, but by their rules required an indorser. We hoped the result would be that things would turn so that I could pay it.

51 By Mr. TARBOX:

I had nothing to do with getting Monell upon the note. I first learned the fact that he had been indorser here to-day. Mr. Mix told me that he had given his note to take it up. Mr. Mix gave his note same day that judgment was confessed. I have paid nothing on the judgment unless the interest that I have paid on notes is payment on it.

E. M. WHITNEY.

Claim of Joshua and John P. P. Lathrop offered by Olmsted.

Claim filed with the clerk, Genesee County, August 3d, 1874, under mortgage given by E. M. Whitney to the claimants, dated April 3d, 1873, for $1,586.78. Recorded April 4th, 1873, liber 73, of mort., page 129. Said notice marked Exhibit L; and proof said claim received, marked Exhibit M; also mortgage and bond received, marked Exhibit O.

Also, claim of John P. P. Lathrop under judgment recovered against E. M. Whitney, and docketed in Genesee County clerk's office, April 3d, 1873, for $1,046.42, received and marked Exhibit P; also, statement

and proof of claim under this judgment received a' marked Exhibit R; also, certified copy of judgment roll of John P. P. Lathrop vs. E. M. Whitney, received, showing recovery and costs, $1,016.42, April 3d, 1873, marked Exhibit S.

52 Mr. WHITNEY recalled by Mr. Bangs.

This mortgage to Joshua and John P. P. Lathrop was for cash advanced to me previous to September 1, 1872, no part of which has been paid. No part of the judgment held by John P. P. Lathrop has been paid.

E. M. WHITNEY.

(Mr. Peck objects to the judgment in favor of John P. P. Lathrop being offered in evidence, or any proof being given relating to it, on the ground that the judgment is invalid, it is a judgment by confession, the statement being insufficient as to the consideration under the code of procedure.)

It is considered by all the parties that all the mortgages produced cover and embrace the same premises.

TRACY PARDEE, called by Mr. Taggart and sworn, says:

That there was not anything more than 7 per cent. taken or paid on the $1,000-note indorsed by McCormick and mentioned by McIntyre in his testimony from June, 1872, up to the present time, or on the renewals. In reference to the Flour City notes we did not charge him anything over and above 7 per cent., except it was if we gave him a draft we charged him the legal rate. I never had any conversation with Mr. McIntyre in the presence of Whitney when I directed McIntyre to take ⅛ per cent. over 7 per cent. in May or June, 1873. I never directed Mr. McIntyre to take more than 7 per cent. from Whitney in relation to the Flour City notes, unless it was to pay for draft on New York. I am the president of First National Bank of Batavia.

53 By Mr. OLMSTED:

I don't recollect where the $1,000 note indorsed by McCormick originated. Can't tell exactly when it was first discounted. Think it had been running a long time. I had personal knowledge of the discount of this note. I did the business personally. That is, I made the arrangement. Mr. McIntyre made the figures. I gave him the direction and supposed he followed it. I have no personal knowledge whether McIntyre followed my directions.

In May or June, 1873, I have no recollection of any conversation with Mr. Whitney in presence of McIntyre when I directed McIntyre to take ⅛ per cent. Don't think we had any conversation of that kind; should recollect it if we had.

Q. Did you in May or June, 1873, in conversation with McIntyre, in the presence of Whitney, say to McIntyre in response to a question by him as to how much he should charge Whitney on the $530 note, that we will not be hard on Whitney; charging him ⅛ of 1 per cent.?

A. No; I know I never said any such thing. My impression is that we never charged any exchange on the $1,000 note after the spring of 1872. I presume that we did before that charge exchange of ¼ per cent. Can't say whether we did or did not. I think we did not charge ¼ per cent. on that note as late as September, 1872. I can't say positively how long we did charge it.

Q. Was it the custom of your bank to charge ¼ per cent. exchange on discounting paper an addititon to 7 per cent. interest as late as September, 1872?

54 (Objected to by Mr. Day.)

A. Some times we did, and some times we did not.

Q. Can you swear positively that you did not, to your own knowledge, take ¼ per cent. exchange on this paper down to September, 1872?

A. I can't say, but my best recollection is I did not. Can't say positive. I did not personally do the business of discounting any of this paper.

TRACY PARDEE.

Supreme court, Genesee County.

JOHN P. P. LATHROP *against* EDWARD M. WHITNEY.

I, Edward M. Whitney, the defendant above named, do hereby confess myself justly indebted to John P. P. Lathrop, the above named plaintiff, in the sum of one thousand dollars and interest thereon from the 21st day of September, 1872, and I do hereby authorize him or his executors, administrators, attorney, or assigns to enter a judgment against me for that amount and interest as aforesaid and costs and disbursements.

55 The above indebtedness arose as follows, viz:

A draft made by the said defendant, Edward M. Whitney, on the said plaintiff, John P. P. Lathrop, dated August 19th, 1872, for the said sum of one thousand dollars, payable thirty days after the date thereof, accepted by the said John P. P. Lathrop, payable at his office, 109 Broad Street, New York, and paid by the said John P. P. Lathrop at maturity, and which said draft and acceptance is in the words and figures following, viz:

$1,000.] BATAVIA, *August 19th*, 1872.

Thirty days after date pay to the order of E. M. Whitney, one thousand dollars, value received, and charge the same to the account of

E. M. WHITNEY.

To JOHN P. P. LATHROP,
109 *Broad Street, New York.*

[U. S. Revenue Stamp. 50c. Cancelled.]

Accepted, payable at my office, 109 Broad Street, New York.

J. P. P. LATHROP.

Paid, September 21st.

(Indorsed on the back:) E. M. Whitney.

And I do further state that the above sum of one thousand dollars, with interest thereon from the 21st day of September, 1872, is now justly due from me to the said John P. P. Lathrop, the said plaintiff, without any fraud whatever.

56 GENESEE COUNTY, *ss:*

EDWARD M. WHITNEY, being duly sworn, says:

That he is the defendant above named, that he has heard read the above confession of judgment by him signed, and that the said statement of confession is true.

E. M. WHITNEY.

Sworn before me this 3d day of April, A. D. 1873.

C. A. HULL,
Clerk Genesee County.

Upon filing the foregoing statement of confession and affidavit, on motion of John R. Olmsted, plaintiff's attorney, it is hereby adjudged that the plaintiff recover of the defendant the sum of one thousand and thirty-nine dollars and twenty-two cents ($1,039.22) with $7.20 costs and disbursements, amounting to the sum of $1,046.42.

C. A. HULL, *Clerk.*

Filed April 3d, 1873, 4 3-4 p. m.

STATE OF NEW YORK,
Genesee County Clerk's Office:

I, Charles A. Hull, clerk of the county of Genesee, of the county court of said county, and of the supreme court, both being courts of record, having a common seal, do hereby certify that I have
57 compared the copy of the judgment roll hereunto annexed with the original, filed April 3d, 1873, in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Batavia, this 23d day of August, 1874.

[L. S.] C. A. HULL, *Clerk.*

Supreme court, county of Genesee.

JOHN W. MIX
against
EDWARD M. WHITNEY.

I, the subscriber hereto, do hereby confess judgment in favor of John W. Mix for the sum of twelve hundred thirty-four and 86-100 dollars, and authorize judgment to be entered against me for that sum, besides costs.

This confession of judgment is for a debt justly from me due to said John W. Mix, and the following is a statement of facts upon which said confession of judgment is founded:

58 On the 18th day of July, 1872, I made my note for twelve hundred dollars to the order of said Mix, at sixty days, payable at the National Bank of Genesee, of Batavia, which note the said Mix, at my request and for my accommodation solely, did duly endorse to enable me to discount the same. That the same was discounted by me at said bank. I received the whole amount thereof in lawful money, and used the same in my business. That when the same became payable the said Mix was charged by due presentation and demand of payment and notice to him of non-payment by me; whereby he became liable to and did pay the amount of said notes and costs of protest to the said bank, amounting to $1,201.26. That said indorsement by said Mix was purely for my accommodation, and he never received any of the proceeds of said note directly or indirectly or any consideration whatever. That said note is now held and owned by said Mix, and is a valid and subsisting claim against me, no part thereof ever having been paid or satisfied except as aforesaid. That the said note became due and payable on or about the 19th day of September, 1872, on which day demand of payment was made on me and refused, I being unable to meet the same. Wherefore the same was duly protested for non-payment, of which said Mix had notice. That said note is still due and payable, and so became prior to this statement and confession. That there is accrued and due $33.60 interest on said note since the 19th day of September, 1872.

59 COUNTY OF GENESEE:

EDWARD M. WHITNEY, above named, being duly sworn, says: That the facts upon which the above confession of judgment is founded are truly set forth in the above statement, and that said statement is in all respects true.

E. M. WHITNEY.

Sworn before me this 12th day of Sept., 1873.

S. A. SHERWIN,
Justice of the Peace.

I certify that the within is a true copy of the judgment roll on file in this action *in this action* in Genesee County clerk's office and the whole of such original.

Witness my hand and the seal of said county this 7th day of September, 1874.

[L. S.] C. A. HULL, *Clerk.*

Supreme court.

JOHN W. MIX
against
EDWARD M. WHITNEY.

On filing a confession and statement made by Edward M. Whitney, in pursuance of chapter 3, title 12, of the code of procedure, it is
60 adjudged that John W. Mix, in whose favor such confession is made, recover against the said Edward M. Whitney twelve hundred and thirty-four dollars and eighty-six cents, and six dollars and eighty-three cents costs and disbursements.

C. A. HULL, *Clerk.*

Filed February 13th, 1873, 9 a. m.

Supreme court, Genesee County.

JOHN W. MIX
against
EDWARD M. WHITNEY.

Recovery, $1,234.83; costs, 6.83.

Perfected and docketed February 13th, 1873, at 9 o'clock a. m.

H. F. TARBOX,
Attorney.

61 STATE OF NEW YORK,
Genesee County Clerk's Office:

I, Charles A. Hull, clerk of the county of Genesee, of the county court of said county, and of the supreme court, both being courts of record, having a common seal, do hereby certify that I have compared the copy of the evidence, referee's report, &c., hereunto annexed, with the original, filed October 10, 1874, in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Batavia, this 27th day of October, 1874.

[L. S.] C. A. HULL, *Clerk.*

STATE OF NEW YORK,
Genesee County Clerk's Office:

BATAVIA, N. Y., *September 5th*, 1874.

The above is a correct transcript from the docket of a judgment in this office. C. A. HULL, *Clerk.*

62 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY, HOMER BOSTWICK, Ebenezer M. McCormick, The National Bank of Genesee of Batavia, and others.

Exceptions taken by the defendant, the National Bank of Genesee of Batavia, to the report of W. W. Rowley, referee, to whom it was referred to report claims and priorities on surplus money.

FIRST EXCEPTION.

For that the said referee has in and by his said report certified and reported that the mortgage given by Whitney to the National Bank of Genesee was valid as security only for the existing indebtedness of Whitney to the bank at that time, viz, $3,200. Whereas he should have certified and reported that said mortgage was valid security for any liability incurred by said Whitney to said bank, or any indebtedness from him to said bank, to any amount not exceeding $5,000 and interest, from the date of said mortgage.

63 SECOND EXCEPTION.

For that the said referee has in and by his said report certified and reported that such indebtedness of $3,200, which said mortgage was given to secure, has been fully paid and satisfied; whereas he should have reported that no part thereof has been paid.

THIRD EXCEPTION.

For that the said referee has in and by his said report certified and reported that the National Bank of Genesee has no claim or lien upon the surplus moneys in this action.

FOURTH EXCEPTION.

For that the said referee has in and by his said report certified and reported that the mortgages held by Bostwick and by McCormick, respectively, are good and valid securities for any liabilities incurred by them as indorsers for Whitney to any amount not exceeding $2,500 and $1,500 respectively; whereas he should have certified and reported that neither of said last-mentioned mortgages are entitled to or can recover any greater sum than the amount actually paid by them respectively as such indorsers.

FIFTH EXCEPTION.

For that the said referee has in and by his said report certified and

reported that the two last-mentioned mortgages are not defeated
64 by the fact that the notes upon which they are at present liable were given subsequent to the recording and docketing of the other claimants' mortgage and judgment; whereas he should have certified and reported that they are thereby defeated.

SIXTH EXCEPTION.

For that the said referee has in and by this said report certified and reported that the claimant, Homer Bostwick, under and by virtue of the mortgage executed to him by the said Edward M. Whitney, is entitled to $2,500 of such surplus moneys; and that the said claimant, Ebenezer M. McCormick, under and by virtue of the mortgage executed to him by said Edward M. Whitney, is entitled to the balance of such surplus moneys, and that there is no lien or claim thereon prior to said Bostwick mortgage, and that said McCormick's mortgage is a lien next to said Bostwick's mortgage; whereas the said referee ought to have reported that the said National Bank of Genesee is prior in right to the said Bostwick and McCormick, or either of them, and that there is no lien or claim to said surplus money prior to that of said National Bank of Genesee; and whereas he, the said referee, should have reported that the said defendant the National Bank of Genesee is entitled to said surplus moneys, to wit, $3,889.80, the whole of said surplus moneys.

In all of which particulars the report of said referee is, as the said The National Bank of Genesee is advised and claims, erroneous.

WAKEMAN & WATSON,
Att'ys for said National Bank of Genesee.

65 *Exceptions to referee's report.*

Supreme Court.

MARIA CROCKER
against
EDW'D M. WHITNEY, EBENEZER M. McCORMICK, and others, defendants.

The defendants Edward M. Whitney, Joshua Lathrop, and John P. P. Lathrop except to the report of W. W. Rowley, the referee herein, dated October 6th, 1874, as follows:

First. Because the said referee has omitted to find as a fact that the notes held by the National Bank of Genesee, made by said Whitney and indorsed by Homer Bostwick, dated June 2d, 1874, and due thirty days from date, one for $740, the other for $635, are usurious and void, as the evidence herein showed, or to make any finding whatever on that subject.

Second. Because the said referee has omitted to find as a fact that the note held by the First National Bank of Batavia, N. Y., made by said Whitney and indorsed by said Homer Bostwick, dated May 28th, 1874, due thirty days from date, for $1,228.97, is usurious and void, as the evidence herein showed, or to make any finding whatever on that subject.

66 Third. Because the said referee has omitted to find as a fact that the notes held by the First National Bank of Batavia, N. Y., made by Whitney and indorsed by McCormick, and dated May 28th, 1874, one for $430, and the other for $1,034.30, are usurious and void, as proved by the evidence herein, or to make any finding whatever on that subject.

ruary fourth. Because the said referee has omitted to find as a fact that judge mortgage given by said Whitney to said Joshua and John P. P. Lathrop, dated April 3d, 1873, and recorded April 4th, 1873, in Genesee County clerk's office, in liber 73, at page 129, for $1,586.78, was given for advances made to said Whitney by said Joshua and John P. P. Lathrop prior to September 1st, 1872, as shown by the evidence herein.

Fifth. Because the said referee has found and reported as matter of law "that the mortgage held by Bostwick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $2,500;" whereas he ought not to have so found and reported, but should have found and reported as matter of law that the said mortgage was not a good and valid security or mortgage as against the defendant Edward M. Whitney, and the defendants and claimants Joshua and John P. P. Lathrop, subsequent mortgagees, for value, the said Bostwick not having paid anything on his indorsements as found by said referee.

67 Sixth. Because the said referee has found and reported as matter of law "that the mortgage held by McCormick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $1,500;" whereas he ought not to have so found and reported, but should have found and reported as matters of law that the said mortgage was not a good and valid security or mortgage as against the defendant Edward M. Whitney, and the defendants and claimants Joshua and John P. P. Lathrop, subsequent mortgagees, for value, the said McCormick not having paid anything on his indorsements as found by said referee.

Seventh. Because the said referee has found and reported as matters of law "that the said Homer Bostwick, under and by virtue of the mortgage executed to him by Edward M. Whitney, is entitled to $2,500 of said surplus moneys, and that the claimant Ebenezer M. McCormick, under and by virtue of the mortgage executed to him by Edward M. Whitney, is entitled to the balance of such moneys, and that there is no lien or claim thereon prior to the said Boswick mortgage;" whereas he ought not to have so found and reported, but should have found and reported as matter of law that the said Joshua and John P. P. Lathorp, under and by virtue of the mortgage executed to them by the said

68 Edward M. Whitney, dated April 3d, 1873, are entited to the said surplus moneys to the amounts of $1,586.78, with interest from April 3d, 1873, and that the defendant and claimant John P. P. Lathrop, under and by virtue of his judgment recovered against the said Edward M. Whitney in the supreme court, April 3d, 1873, is entitled to the balance of such surplus moneys to the amount of $1,046.42, with interest from April 3d, 1873, and that there is no lien or claim thereon prior to said Joshua and John P. P. Lathrop's mortgage, and that said John P. P. Lathrop's judgment is a lien and claim next to said Joshua and John P. P. Lathrop's mortgage.

Dated October 20th, 1874.

J. R. OLMSTED,
Att'y for Def'ts and Claimants E. M. Whitney and J. and J. P. P. Lathrop, Le Roy, N. Y.

To TAGGART & DAY,
Att'ys for Def't and Claimant.
E. M. MCCORMICK and
C. A. HULL,
Clerk of Genesee County.

69 *Exceptions to referee's report.*

Supreme court.

MARIA CROCKER
against
EDWD. M. WHITNEY, EBENEZER M. McCORMICK, and others, defendants.

The defendant, John W. Mix, excepts to the report of W. W. Rowley, esq., the referee herein, dated October 6th, 1874, as follows:

First. Because the said referee has omitted to find as a fact that the notes held by the National Bank of Genesee of Batavia, made by said Whitney and indorsed by Homer Bostwick, dated June 2d, 1874, and due thirty days from date, one for $740 and the other for $635, are usurious and void, as the evidence herein showed, or to make any finding whatever on that subject.

Second. Because the said referee has omitted to find as a fact that the note held by the First National Bank of Batavia, made by said Whitney and indorsed by said Bostwick, dated May 28th, 1874, due thirty days from date, for $1,228.97, is usurious and void, as the evidence herein showed, or to make any finding whatever on that subject.

70 Third. Because the said referee has omitted to find as a fact that the notes held by the First National Bank of Batavia, made by Whitney and indorsed by defendant, McCormick, dated May 28, 1874, one for $430 and the other for $1,034.30, are usurious and void, as proved by the evidence herein, or to make any finding whatever on that subject.

Fourth. Because the said referee has found and reported as matter of law that the mortgages held by defendants, Bostwick and McCormick, are good and valid securities for any liability incurred by either of them as indorsed for Whitney, the former to an amount not exceeding $2,500, and the latter to an amount not exceeding $1,500. Whereas he ought not to have so found and reported as to either of said mortgages, but should have found and reported as matter of law, that neither of said mortgages were good and valid securities or mortgages as against the defendant, John W. Mix, the said Bostwick and McCormick not having paid anything on their indorsements as found by said referee.

Fifth. Because the said referee has found and reported as matters of law "that the said Homer Bostwick, under and by virtue of the mortgage executed to him by Edward M. Whitney, is entitled to $2,500 of said surplus moneys, and that the claimant, Ebenezer M. McCor-
71 mick, under and by virtue of the mortgage executed to him by Edward M. Whitney, is entitled to the balance of such surplus moneys, and that there is no lien or claim thereon prior to the said Bostwick's mortgage, and that said McCormick's mortgage is a lien next to said Bostwick's mortgage."

Whereas he ought not to have so found and reported, but should have found and reported as matters of law, that the said John W. Mix, under and by virtue of the judgment recovered by him against the said Edward M. Whitney, on the 12th day of February, 1873, is entitled to the said surplus moneys to the amount of $1,234.86 with interest from Feb-

ruary 12th, 1873, and that there is no lien or claim thereon prior to the judgment of said John W. Mix.

Dated October 20th, 1874.

TARBOX & SHERWIN,
Attorneys for Defendant, John W. Mix.

To Messrs. TAGGART & DAY, and
C. A. HULL,
Clerk of Genesee County, N. Y.

72 *Opinion.*

Supreme court.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

Erie County special term, November, 1874.

BARKER, J.:

By the report the National Bank of Genesee is excluded from sharing in the surplus moneys.

The ruling of the referee is by the bank excepted to.

The learned referee places his decision upon the ground that the bank was prohibited by the terms of the United States banking law from taking a mortgage concurrently with the discount of paper in order to secure it; that its charter only authorized it to take mortgages on real estate to secure debts previously contracted.

A careful examination of the provisions of the act and of fundamental principles of law applicable to the question, will demonstrate that the conclusion of the referee is erroneous.

73 According to the finding of the referee, the debt due the bank arose upon discount of paper made by Edward M. Whitney, the mortgagor, and indorsed by others for his accommodation. This was proper and usual banking; a valid debt was created thereby, enforceable and collectible in the mode and manner that such debts usually are, unless there be in the bank's charter some special prohibition to the contrary. The bank on making the discount could rightfully take the same security that an individual might for its repayment.

By the eighth section of the general act, the bank may "exercise, under this act, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debts * * * * by loaning money on personal security."

This provision is but declaritory of the power possessed by the common law of the land, that "all corporations possess such powers as are specially granted by the act of incorporation, or such as are necessary for the purpose of carrying into effect the powers expressly granted, and no others." (2 Kent's Com., 298; 4 Wheaton, 656; 4 Hill, 443.)

It cannot be denied that it is usual and customary, as it is certainly proper and discreet, for banks on loaning money, by way of discount of commercial paper, to take security for its repayment on real estate.

74 This security may come from the borrower himself, from his sureties on the paper, or from third persons. The only prohibi-

tions are contained in the 28th section: "That it shall be lawful for any such association to purchase, hold, and convey real estate," as follows:

First. "Such as shall be necessary for its immediate accommodation in the transaction of its business."

Second. "Such as shall be mortgaged to it in good faith by way of security for debts previously contracted."

Third. "Such as shall be conveyed to it, in satisfaction of debts previously contracted."

Fourth. "Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or shall purchase to secure debts due to such association."

"Such association shall not purchase or hold real estate in any other case, or for any other purpose than is specified in this section."

This section means to prohibit the banks, formed under the act, from vesting their capital in real property and engaging in land speculations.

75 A mortgage taken to secure a loan by way of discount being bona fide, a discount of commercial paper in the course of business and according to the usage of banking operations is not surety within the prohibition.

If the transaction takes the form of a discount as a mere cover of the intent to loan money on land, either as an investment or as a means of acquiring title thereto, it would be invalid and fall as a mere evasion of the statute.

Under the second and third subdivisions of the section, in cases like those three mentioned, I understand the bank can bargain for a purchase of the land directly with the owner, without the intervention of judicial process and public sale.

Under the fourth subdivision the bank can purchase land at judicial sales, when it owns the judgment decree or mortgage.

It is manifest the security of mortgage here mentioned is very different from the case provided for in the second clause of the section.

To illustrate the right of the bank to take security on real estate, at the time of making the discount, suppose the borrower should pledge to the bank a mortgage held by him, executed by a third person, can it be said that the bank has no lien upon the land and cannot inforce the pledge for the purpose of securing the payment of the paper discounted?

76 A banking corporation has no right to purchase and hold goods, wares, and merchandize. Such transactions are not within the scope of its business. Yet a bank concurrent with a loan of money or discount of paper can receive as collateral security thereto a bill of lading covering a cargo of grain; and, if necessary, reduce the title to itself in proceedings to enforce payment of the debt.

All such transactions are incidental to the business of banking, and within the express power to carry on banking business. They have the authority to discount commercial paper; to loan money; to become creditors. They must have the right to secure and collect debts thus legally contracted. (Talmage vs. Peel, 7 N. Y., 343; Bates & Hews vs Bank of Alabama, 2 Abb., 465; The Silver Lake Bank vs. North, 4 John, ch. 370.)

It was, therefore, error to hold that the National Bank of Genesee had no valid lien on the surplus money.

It is insisted by the bank, that upon the fact found by the referee, that it was error to hold that the sum of $3,200 due the bank at the time of the execution of the mortgage had been fully paid.

I do not deem it necessary to consider and rule upon the question, as there must be another hearing in this case. Then the facts may be found differently.

It appears that the mortgage to the bank was executed and de-
77 livered before the mortgages to Bostwick and McCormick, but recorded later in point of time. The referee has not passed on the question whether the subsequent mortgagees had notice of the bank's prior mortgage when they received their own, though some evidence was given on that subject. The ruling that the bank had no lien in law on the funds made the question unimportant. The ruling now made makes that a prominent fact on the question of priority between these parties, and it must be referred back to the same referee to pass on the question.

I concur with the views of the referee that Bostwick and McCormick have a lien on the funds, though they have not paid the debt for which they stand as sureties.

The ruling that the incumbrances subsequent to Bostwick are in no position to attack prior liens for money, is sound and based on ample authority.

The exceptions taken by the bank are sustained while the exceptions by other parties are overruled. It is proper that they have liberty to attend the further hearing and give further evidence.

It is referred back to the same referee on the same evidence, and to take further proof if any is offered by the parties, and to report anew upon the rights of the parties, and either party may file new exceptions. All questions of costs reserved until the coming in of the report.

The counsel for the bank will prepare an order and submit it for approval.

78 At a special term of the supreme court held at the court-house in the city of Buffalo, on the second Tuesday of November, 1874.

Present, Hon. George Barker, justice.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

It having been referred to W. W. Rowley, esq., of Buffalo, N. Y., counsellor-at-law, to take proof as to the rights and interests of certain parties in and to certain surplus moneys arising from foreclosure sale herein, and to report the facts found by him and his conclusions thereon to this court, and the said referee having taken such proofs, and duly made and filed his report, and exceptions to such report having been duly taken and filed by the claimants, the National Bank of Genesee, of Batavia, Edward M. Whitney, Joshua Lathrop and John P. P. Lathrop, and John W. Mix, by their respective attorneys, and a motion having been made to confirm in all things said report, after hearing Messrs. Taggart & Day, counsel for Ebenezer M. McCormick, and Myron H. Peck, esq., counsel for Homer Bostwick, for said motion; and W. C. Watson, esq., counsel for the claimant the National Bank of
79 Genesee; L. N. Bangs, esq., and J. R. Olmsted, esq., counsel for John P. P. Lathrop, Joshua Lathrop and Edward M. Whitney,

and Messrs. Tarbox & Sherwin, counsel for John W. Mix, opposed; and due deliberation having been had thereon,

Ordered that the exceptions taken by the National Bank of Genesee be sustained, and the exceptions taken by the other claimants be overruled. That it be referred back to W. W. Rowley, esq., the same referee, to be heard de novo upon the same evidence, and to take further proof, if any is offered by the parties, and to report anew as to their rights herein, and that all the parties have liberty to attend the further hearing and give further evidence.

That any party may file new exceptions upon the filing of the report, and that all questions of costs be reserved until the coming in of the report.

Erie special term.

NOVEMBER, 1875.

The within order granted, and ordered entered in Genesee County.

GEORGE BARKER.

80 At a special term of the supreme court, held at the court-house, in the city of Buffalo, on the second Tuesday of November, 1874.

Present, Hon. George Barker, justice.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

It having been referred to W. W. Rowley, esq., of Buffalo, N. Y., counsellor-at-law, to take proof as to the rights and interests of certain parties in and to certain surplus moneys arising from foreclosure sale herein, and to report the facts found by him and his conclusions thereon to this court, and the said referee having taken such proofs, and duly made and filed his report; and exceptions to such report being duly taken and filed by the claimants; the National Bank of Genesee, of Batavia, Edward M. Whitney, Joshua Lathrop and John P. P. Lathrop, and John W. Mix, by their respective attorneys, and a motion having been made to confirm in all things said report, after hearing Messrs. Taggart & Day, counsel for Ebenezer M. McCormick, and Myron H. Peck, esq., counsel for Bostwick, for said motion; and Wm. C. Watson, esq., counsel for the claimant the National Bank of Genesee;

81 L. N. Bangs, esq., and J. R. Olmsted, esq., counsel for John P. P. Lathrop, Joshua Lathrop, and Edward M. Whitney, and Messrs. Tarbox & Sherwin, counsel for John W. Mix, opposed; and due deliberation having been had thereon,

Ordered, that the exceptions taken by the National Bank of Genesee be sustained, and the exceptions taken by the other claimants be overruled; that it be referred back to W. W. Rowley, esq., the same referee, to be heard de novo upon the same evidence, and to take further proof, if any is offered by the parties, and to report anew as to their rights herein; and that all the parties have liberty to attend the further hearing and give further evidence.

That any party may file new exceptions upon the filing of the report, and that all questions of costs be reserved until the coming in of the report.

82 Supreme court.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

To the supreme court of the State of New York:

In pursuance of an order of this court made in the above entitled action, bearing date the second Tuesday of November, 1874, hereto attached, making part of this report,

I do respectfully report, that on the 28th day of August, 1874, all the parties who had appeared in this action and all the parties who had filed written notices of their claims to such surplus moneys duly appeared before me, who thereupon, after having the usual oath of referee duly administered, proceeded to a hearing of the said matters.

That I was attended by John R. Olmsted as attorney, and L. N. Bangs as counsel for Joshua Lathrop and John P. P. Lathrop, and by Myron H. Peck for Homer Bostwick, and by Messrs. Taggart & Day for Ebenezer M. McCormick, and by Messrs. Wakeman & Watson for the National Bank of Genesee, and by Messrs. Tarbox & Sherwin for John W. Mix.

83 The amount of the surplus moneys is $3,889.80, as appears by the certificate of the treasurer of the county of Genesee, hereto annexed as Exhibit first.

That all the parties above named introduced their claims hereto annexed and made proofs thereof, which are hereto annexed, forming part of the report, and I find the facts as stated therein to be, that all the liens or incumbrances are upon the same premises which were sold in this action.

That the claimant the National Bank of Genesee was chartered under the national banking act passed in 1864, in the month of May, 1865, and is still doing business under such charter.

That on the 12th day of January, 1871, Edward M. Whitney, the owner and mortgagor of the premises sold in this action, made, executed, and delivered a mortgage dated on that day to the said National Bank of Genesee, conditioned and intended as security for the payment of $5,000 one year from its date, to be held by said bank as collateral security for the payment of all notes at that time held by said bank against said Whitney, and for any other indebtedness of said Whitney there due or thereafter to become due; that such mortgage was duly recorded on the 19th day of September, 1872, in liber 71 of mortgages, page 372; that at the time said mortgage was given, Whitney was actually indebted to the bank in the sum of $3,200, and no more; that at the time such mortgage was given by said Whitney to the bank,

84 and concurrent therewith, there was no money loaned, or discounts made, nor any advancements whatever made on the part of such bank to said Whitney; that after such mortgage was given Whitney continued to do business with the bank, of which the bank kept but one account, in which the indebtedness of $3,200 secured by the mortgage was entered; that such account of Whitney with the said bank amounted to a large sum, one branch of which, viz, the discount of notes and drafts between the 16th day of January, 1871, and the 28th day of August, 1874, inclusive, amounted to $71,175.32; another branch of such account, viz, payments made by Whitney to the bank during the same period, amounted to $168,237.51; that these two items constitute only part of his general account with the bank; that all such debts

and credits were made in his general open account heretofore mentioned.

That said Whitney was indebted to said claimant, the National Bank of Genesee, on the 18th day of June, 1874, in the sum of $5,160.10, and that no part of such indebtedness has been paid; that such indebtedness of Whitney to said bank is made up by renewals of former liabilities, some part of which has existed since May, 1872, and all, with the exception of interest, since September, 1872.

That the bank holds no security for this indebtedness other than the mortgage above mentioned.

That the bank also holds two notes made by Whitney and endorsed by H. Bostwick, one for $740 and the other for $635, both past due and unpaid.

85 That the said National Bank of Genesee purchased the premises so mortgaged to it by Whitney upon the sale for which the surplus moneys in question arose, and has received a conveyance thereof.

That the said National Bank of Genesee exacted and received from Whitney a rate of interest greater than seven per cent. upon all notes discounted by it for him prior to September, 1873, and after that date exacted and received only the lawful rate of interest upon such discounts.

That all the notes made by Whitney and held by the bank on the 30th day of September, 1872, have been kept alive by renewals, and, with the exception of said two notes indorsed by Bostwick, are included in and represented by said note of $5,160.10.

Second. That the claimant Homer Bostwick holds a mortgage given by said Edward M. Whitney to said Homer Bostwick, bearing date September 16th, 1872, recorded same day at 12 m. in liber 71 of mortgages, page 369, in Genesee County clerk's office, conditioned as follows: "As security for the payment of any and all liabilities and indebtedness that has already or hereafter may be incurred by the said Homer Bostwick for and on account of the said Edward M. Whitney, either by indorsement or otherwise, to an amount not exceeding $2,500."

86 That at the time such mortgage was given the National Bank of Genesee held two notes made by Whitney and indorsed by Bostwick, one for $700 and the other for $600, both maturing the following month; that these two notes have not been paid, but have been renewed from time to time, and now with some accumulations are represented by the two notes introduced in evidence by said claimant, each bearing date June 2d, 1874, signed by Whitney and indorsed by claimant, one for $740 and the other $635, both due thirty days from date.

That said National Bank of Genesee exacted and received from said Whitney, upon discounting the notes held at the time said mortgage was given to said Bostwick, a greater rate of interest than seven per cent. per annum.

That at the time said mortgage was given, the First National Bank of Batavia held two other notes made by Whitney and indorsed by claimant, one for $500 and the other for $700; that these two notes have not been paid, but have been renewed from time to time, and now, with some accumulations, are represented by the note introduced in evidence by claimant, bearing date May 28, 1874, made by Whitney and indorsed by claimant for $1,228.97, due thirty days from date.

That said First National Bank of Batavia exacted and received from said Whitney, upon discounting the said two notes held at the time said

mortgage was given to said claimant, a greater rate of interest than seven per cent. per annum.

87 That said three notes are held by the said two banks respectively, and are past due and remain unpaid. That the claimant has been duly charged thereon as indorser.

Third. That the claimant Ebenezer M. McCormick holds a mortgage given by said Edward M. Whitney to said claimant, bearing date September 16, 1872, recorded same day at 1¾ p. m. in liber 71 of mortgages, page 370, in Genesee County clerk's office, conditioned as follows: "For the security for the payment of any and all liabilities and indebtedness that has already or hereafter may be incurred by the said Ebenezer M. McCormick for and on account of the said Edward M. Whitney, either by indorsement or otherwise, to an amount not exceeding $1,500."

That at the time such mortgage was given said claimant was liable as indorser upon two notes made by Whitney, one of $500 payable at the National Flour City Bank of Rochester; the other of $1,000, payable at the First National Bank of Batavia. That the note of $300 was paid February 24th, 1873, from the proceeds of a new note, made by Whitney and endorsed by claimant, for $530, payable at the First National Bank of Batavia. That subsequently Whitney paid on this note $100, and that the balance, viz, $430, has been renewed from time to time, and is now represented by the note introduced in evidence, May 28, 1874, for that amount, made by Whitney and indorsed by claimant.

88 That the First National Bank of Batavia did not exact, nor did it receive, upon the discounting of this note, at any time more than the lawful rate of interest.

That the note for $1,000 has not been paid, but has been renewed from time to time, and, with some accumulations, is represented by the note introduced in evidence bearing date May 28, 1874, for $1,034.30, made by Whitney and endorsed by claimant.

That the First National Bank of Batavia did exact and receive from said Whitney, upon discounting the said note of $1,000 held at the time said mortgage was given to said claimant, a greater rate of interest than seven per cent. per annum.

That these two notes are held by the First National Bank of Batavia, are past due, and remain unpaid. That the claimant has been duly charged thereon as indorser.

Fourth. That claimant John W. Mix has a judgment by confession in the supreme court, duly entered and docketed in the Genesee County clerk's office on the 13th day of February, 1873, for $1,234.83, against said Edward M. Whitney. That Whitney has paid the interest on the judgment, but no part of the principal has been paid. That said judgment was given said Mix to indemnify him for the payment of a note made by Whitney and indorsed by Mix for said Whitney's accom-

89 modation. That said note was paid and taken up by said Mix on the day said judgment was given, to wit, February 13, 1873, and that the amount so paid by said Mix was $1,234.83.

Fifth. That the claimants Joshua and John P. P. Lathrop hold a mortgage given by said Edward M. Whitney to the claimants, bearing date April 3, 1873, recorded April 4, 1873, in liber 73 of mortgages, page 129, in Genesee County clerk's office, for $1,586.78. That said mortgage was given to secure the bond of said Whitney of same date, conditioned to pay said sum one day after date. That the whole amount is due, with interest from April 3, 1873, and is wholly unpaid. That said sum

of $1,586.78 was advanced by said mortgagees to said Whitney prior to September 1st, 1872.

That claimant John P. P. Lathrop holds a judgment by confession in the supreme court, duly docketed in the Genesee County clerk's office on the 3d day of April, 1873, for $1,046.42, against said Edward M. Whitney. That no part thereof has been paid.

Seventh. That said Edward M. Whitney is insolvent.

Eighth. That Homer Bostwick, at the time he received the mortgage from said Edward M. Whitney, had knowledge of the mortgage at that time existing and held by the National Bank of Genesee.

90 That Ebenezer M. McCormick, at the time of receiving the mortgage from said Whitney, had no knowledge of either the said mortgage to National Bank of Genesee or to said Bostwick, except what was afforded by the record in the Genesee County clerk's office.

Tenth. That the indebtedness of Whitney to the bank, amounting to $3,200, existing at the time the mortgage was given by Whitney to the bank, was paid before the execution by Whitney of either of the subsequent mortgages.

Eleventh. That all the discounts and renewals made for Whitney by said bank after his giving the mortgage were made upon his individual notes, without any indorsements or securities.

I find as matter of law—

That the National Bank of Genesee has no claims or liens upon the surplus moneys in this action. That the note introduced by the claimant the National Bank of Genesee, of $5,160.10, is void.

That the mortgage held by Bostwick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $2,500.

91 That the mortgage held by McCormick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $1,500.

That the three notes introduced by claimant Bostwick, one for $740, one for $635, each dated June 2d, 1874, and the other for $1,228.97, dated May 28th, 1874, are void.

That the note introduced by claimant McCormick, for $1,034.30, dated May 28th, 1874, is void. That the note introduced by said claimant for $430, dated May 28th, 1874, is a good, valid, subsisting note.

That the judgment of John W. Mix is a good, valid lien upon the surplus moneys to the amount of $1,234.83, subject to the liens of said Bostwick and McCormick.

That the mortgage of Joshua and John P. P. Lathrop is a good, valid lien upon the surplus moneys to the amount of $1,586.78, with interest from April 3rd, 1873, subject to the said liens of Bostwick, McCormick, and Mix.

That the judgment introduced by John P. P. Lathrop for $1,046.42 is void.

That said claimant Bostwick took his mortgage subject to the national bank mortgage, and gained nothing by having it recorded as against that mortgage.

92 That said McCormick mortgage takes precedence to the national bank mortgage, but is subsequent to the Bostwick mortgage.

That, as to the priority of the liens of the three mortgages last above named, I find that the Bostwick mortgage is first, the McCormick mortgage second, and the national bank mortgage third.

That the situation of claimants Joshua and John P. P. Lathrop is

such that they cannot attack the liens prior to their lien on the ground of usury.

I do find and report that the claimant Homer Bostwick, under and by virtue of the mortgage executed to him by Whitney, is entitled to $2,500 of such surplus moneys, and is the first lien thereon.

That claimant Ebenezer M. McCormick, under and by virtue of the mortgage executed by said Whitney, is entitled to $1,500 of such surplus moneys, and is the second lien thereon.

That said John W. Mix, by virtue of his judgment against said Whitney, is entitled to $1,234.83 of such surplus moneys, and is the third lien thereon.

That claimants Joshua and John P. P. Lathrop, under and by virtue of the mortgage executed to them by said Whitney, are entitled to $1,536.78, with interest from the 3d day of April, 1873, of such surplus moneys, and is the fourth lien thereon.

93 That the surplus moneys be paid to the claimants as above named, so far as the same is sufficient.

October 22d, 1875.

W. W. ROWLEY, *Referee.*

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

JULY 21ST, 1875.

In pursuance of an order of the special term of this court made at Buffalo on the second Tuesday of November, 1874, by Hon. George Barker, the parties met, represented by their attorneys as follows:

The National Bank of Genesee, by Wm. C. Watson.

Homer Bostwick, by Myron H. Peck.

Ebenezer M. McCormick, by Taggart & Day.

Edward M. Whitney, Joshua Lathrop and John P. P. Lathrop, by John R. Olmsted and L. N. Bangs as counsel.

94 Mr. H. U. HOWARD, called as a witness on the part of the National Bank of Genesee, being duly sworn, says:

All of the indebtedness of defendant Whitney to the bank is for notes discounted by the bank for said Whitney. The indebtedness of $3,800 arose on papers discounted at various times previous to that date. Of the drafts discounted for Whitney, only from $1,500 to $1,800 went to pay up notes held by the bank against Whitney. I don't think the indebtedness of $3,200 of Whitney to the bank was at any time reduced after the giving the mortgage. This indebtedness was increased by discounting paper, except one draft that was discounted which came back unpaid. The $3,200, together with the $600, has been kept alive by renewals. The addition was by accumulation of interest and by new discounts. All of this money was advanced upon negotiable paper discounted at the bank. The note introduced in evidence of $5,160 embraces their indebtedness of $3,200 and $600, with accumulations of interest.

By Mr. PECK:

I was examined on a former hearing at some length on this point. My attention there was specifically called to the indebtedness for which the mortgage was given. I remember of bringing one of the bank books at such examination and going through it. The note of $5,160 was put

in evidence. I was inquired of about it. I there traced back $1,000 of that note to 1872, but did not go any farther. When I say that the $3,800 has been continued down to the $5,160 note, that is my impres-
95 sion, based upon an examination of our monthly statement of discounts. The bank discounted a large amount between January 12th, 1871, and June 18th, 1874, for Whitney. I can't tell how much money Whitney paid in during that time, or the amount of credits given him; don't think it was any very large amount, excepting this lien of discount. Our books show that a note of $600 was discounted for Whitney on January 12th, 1871. The notes we held against Whitney previous to the giving the mortgage were renewed after that by taking Whitney's individual note. All of Whitney's discounts that are included in the $5,160 indebtedness were made upon his individual notes. After the giving the mortgage all the discounts and renewals made for Whitney after his giving the mortgage were made upon his individual notes, without any indorsements or sureties. This was the case of the $600 note. I never advanced any money upon the mortgage without taking Whitney's notes. I held the mortgage as collateral for their payment. The $600 note was probably discounted after the mortgage was given—I don't recollect.

Q. In the ordinary custom of the bank, upon discounting paper, do you not require one or more indorsers upon the paper?

(Objected to by Mr. Watson as improper and immaterial.)

96 A. With some exceptions, the usual custom is to require such indorsements. In this case of Whitney I relied upon the security of the mortgage, and also his personal responsibility.

Proceedings adjourned by consent to July 29th, 1875, 9 a. m.

JULY 29TH, 1875—9 A. M.

Parties appeared as before.

H. U. HOWARD recalled:

I have a statement made by my cashier of the notes made and discounted by the bank for Mr. Whitney, as well as the notes paid by Whitney since the date of the mortgage, January 16, 1871.

Statement offered in evidence.

(Objected to by all the appearing parties represented by Taggart, Peck and Bangs and Olmsted, on the ground that the statement does not show the whole account of Whitney with the bank, but only purports to give part of such account; also, that it is immaterial and irrelevant.)

Statement withdrawn.

Proceedings held open to allow Mr. Howard to prepare a full account on the day to be determined for next hearing by agreement of parties.

97 SEPTEMBER 10—10 A. M.

Parties appeared same as before.

AUGUSTUS COWDIN sworn for claimant:

I am cashier of the National Bank of Genesee, of Batavia, N. Y. The account is a copy of bills discounted for defendant Whitney. It extends from January 16th, 1871, up to the 28th day of August, 1874. This shows all the discounts of notes and drafts paid. The first column is discounts, the other payments. This does not include his general account.

By Judge TAGGART:

I cannot now state the account of Whitney January 12th, 1871. We keep a discount book. It contains all the notes and drafts discounted by the bank. It gives the date of note, maker and time, and when it becomes due; also, the amount of note and interest taken; and, if a draft, the name of party drawn on. It also contains the number of note. We also have a book called the "tickler." It contains the notes coming due—a kind of diary. It contains the number of the notes, the name of maker, and when held for collection and when due. The object of tickler is to show what notes are due on a particular day. The number is on note on file. The same number is put in tickler which is the same number in the discount book. We have a book we call the journal. It is used to enter the business transactions for the day. It contains entries of all notes and drafts paid and notes and drafts discounted. It gives the names and amount of the notes paid. It does not give the number of the note paid nor the date. We have another
98 book called bill book, in which the notes are posted from the discount book, under the names of the various parties. This book is kept separately or alphabetically. It also contains the name of maker, indorser and date of maturity, and date when paid. This does not contain number of note. These four are all the books we have relating to discounts. We also have a deposit book. It contains name of depositor and the amount, and in some cases what the deposit was or who by, and date of deposit. I can tell from the books the amount of Mr. Whitney's indebtedness January 12th, 1871, the date and amount of note, and the time it had to run.

By Mr. BANGS:

(Book shown witness.)

This is the bank book of Mr. Whitney, giving an account of his dealings with the bank. The entries are in the handwriting of the officials of the bank. The account begins September 13, 1869. The first credit entered in this book after December 14, 1870, is one of the 19th of December, of $495.33, entered as a discount.

(Seven notes shown witness, attached together, the first dated Dec. 14, 1870, for $500, at 30 days from date; the next, Dec. 19, 1870, $500, at 30 days from date; another, Dec. 21, 1870, $400, at 30 days from date; another, Dec. 31, 1870, $400, at 30 days from date; another, Dec. 31, 1870, $500, at 30 days from date; another, Jan. 4, 1871, $400, at 30 days from date; another, Jan. 7, 1871, $500, at 30 days from date.)

These notes are all made by E. M. Whitney, and indorsed by H.
99 Bostwick. These notes were all discounted by the bank. The note of Dec. 19, 1870, Whitney was credited with $495.33. This was undoubtedly the avails of that note. There was no other discount of Whitney's on that day. The amount of interest figured on this note was $3.17, the stamp 25 cents.

Q. What rate of exchange was charged to make this difference in the amount of note and the proceeds credited to Whitney?

(Objected to by Mr. Watson as improper and immaterial.)

A. There is a difference of $1.25 between the amount avails of this note and the amount avails credited to Whitney. This is the rate of ¼ per cent. Note of Dec. 21, 1870, of $400. On Dec. 21, 1870, Mr. Whitney had a note discounted of $400, at 30 days; $2.53 is deducted for interest and 20 cents for stamp. There is a difference of one dollar in the amount of this note and the avails credited to him. This is at the rate of ¼ per cent. on the amount of note.

Dec. 31, 1870, two notes, one note of $5 0 and one of $400, were discounted. On the $500 there is $3.17 deducted for interest, 25 cents for stamp; and on the $400 note $2.53 for interest and 20 cents for stamp. Whitney is credited for $891.60 on that day. No other notes were discounted for him on that day. He is credited less the amount of avails of these notes $2.25, which is ¼ per cent. on the face of the note.

Jan. 4, 1871, one note of $400 was discounted on that day for Mr.
100 Whitney, $2.53 interest deducted, 20 cent. stamp. At the date of its maturity, Feb. 6, there is a charge against Whitney of $400, which is the same note, I have no doubt. Jan. 7, 1871, note of $500 was discounted on that day. This was the only discount of Whitney on that day; $3:17 deducted for interest and 25 cents for stamp. He was credited $495.33, which is a difference of $1.25 between the amount credited and the avails of the note, which is ¼ per cent. on face of this note. Jan. 12, 1871, E. M. Whitney's note was discounted for $600, which was the only note discounted for him on that day, the note to run 30 days. Amount of interest $3.80, stamp 30 cents, which was deducted. He was credited on that day $594.40, which is $1.50 less than the amount of avails of the note, which is ¼ per cent. on the face of the note.

(This note appeared in evidence and marked Exhibit D 1.

The same notes above named appeared in evidence and marked Exhibit D 2.

The foregoing testimony is taken to same objections of Mr. Watson.)

I have no knowledge that there was any other indebtedness existing against Mr. Whitney on the 12th of Jan., 1871, held by the bank than the notes here referred to. Exhibit D 1 was discounted on that day on his (Whitney's) own indorsement.

101 Redirect by Mr. WATSON:

I have no knowledge whether there was or was not any other indebtedness existing against Mr. Whitney on that day, not having examined the books as to that fact.

A. N. COWDIN.

Recess till 2 p. m.

At 2 p. m., parties appeared same as before.

LEWIS F. MCLEAN sworn on behalf of National Bank of Genesee.

I am book-keeper in the National Bank of Genesee. [Statement shown witness.] This statement is Mr. Whitney's general account with the bank from Jan. 12, 1871, to Nov. 28, 1874. I made this account; it is a correct copy from the books of the bank. This account includes all Whitney's dealing with the bank. The first column to the left shows the date; second column, charges; third column, credits. Where the transactions were discounts I have noted it. There were no other discounts than I have marked.

By Mr. PECK:

I made this account from Whitney's individual ledger account. I did not compare it with any other book in the bank. This account includes all the discounts, deposits, proceeds of drafts, and all matters to his credit; also, all his liabilities and all charges against him.

LEWIS F. MCLEAN.

102 Statements offered in evidence by Mr. Watson. Received and marked Exhibit D 3 and D 4.

EDWARD M. WHITNEY sworn as a witness on behalf of the Lathrops.

(Exhibits D 1 and D 2 shown the witness.)

Q. What amount was paid by you to the bank, by way of exchange, in addition to interest at 7 per cent. and the stamps?

(Objected to by Mr. Watson as improper and immaterial.)

A. I paid a ¼ of one per cent. in addition to interest and stamp. I paid the same rate on all of these notes. (Two notes shown witness.) These are my notes; one for $1,000, dated May 14, 1872, at 30 days after date, signed E. M. Whitney; indorsed E. M. McCormick. The other $1,000, dated June 21, 1872, at 30 days, signed E. M. Whitney; indorsed E. M. McCormick. Both of these payable at National Bank of Batavia, and discounted by that bank.

Q. What rate of interest did you pay on these notes in addition to 7 per cent.?

(Objected by Mr. Taggart on ground that it is incompetent evidence as against McCormick as surety on the note, and immaterial and irrelevant and unadvisable.

Objected to by Mr. Watson on ground that it is incompetent and immaterial; also, that this witness has once been examined on this subject, and same ground gone over.)

103 A. I paid ¼ of one per cent., making $5 on the two notes. May 14th I was credited with $990.59. This is the proceeds of the note discounted that day. Discount, $6.41; stamp, 50 cents; exchange, $2.50. On the note June 21, stamp, 50 cents; interest, $6.41; exchange, $2.50. I was credited with $990.59 proceeds of that note.

(Two notes offered in evidence marked Exhibit D 5.

I can't say positively that the notes in existence when the mortgage was given to McCormick, which the mortgage was to secure, were the renewals of these two notes. My impression is that it is a portion of the same indebtedness.

(Two other notes shown witness, bearing date June 13, 1872. One for $700, the other for $600; one, 30 days—the $600; thirty-five days from date, signed by E. M. Whitney and indorsed by H. Bostwick; both payable at the First National Bank of Batavia, and discounted by it.)

Q. What rate of interest did you pay on these notes, exceeding 7 per cent.?

(Objected to by Mr. Peck—First, on the ground that it is incompetent and wholly immaterial; second, on the ground that it is not new evidence, the witness having been fully examined on the subject of the rate per cent. on discount of the Bostwick paper on the former hearing.)

A. On the note of June 13, $700, I paid ¼ of one per cent. above 7 per cent. On the $600 note I paid ¼ of one per cent. over 7 per cent.

104 One note of June 17, 1872, $700, at 30 days after date, made by E. M. Whitney and indorsed by H. Bostwick; another dated July 20, 1872, $700, at one month, made by E. M. Whitney, indorsed by H. Bostwick; both payable at First National Bank of Batavia, and discounted by it.

(Same question.

Same objection by Mr. Peck, as before.)

A. I paid ¼ of one per cent. on these two notes in addition to 7 per cent.

(These four notes offered in evidence, marked Exhibit D 6.)

Q. Are the notes which are now claimed by Bostwick as secured by the Bostwick mortgage a renewal of these four notes?

(Objected to by Mr. Peck as immaterial.)

A. I think they grew out of these.

By Mr. PECK:

I gave the mortgage to Mrs. Crocker, which was foreclosed in this suit. I never filed any claim to the surplus moneys in this action. I have never set up any claim to it, and do not expect to get any of it. I recollect of being examined on the first hearing in this matter as to what discount was paid on these notes. I have no desire to change that evidence now. I never employed any one in this proceeding for surplus moneys. I do not appear to contest any of these claims, but comply simply as a witness.

E. M. WHITNEY.

105 A. N. COWDIN recalled.

The aggregate of discounts obtained by Whitney of the bank was $171,175.82, and the payments amounted to $168,237.51.

(Exhibit D 3 shown witness.)

This account does not embrace all the transactions of Whitney with the bank. The note of December 14, 1870, for $500 was charged up to Whitney January 19, 1871, at $500.29, which was three days after it was due.

Redirect by Mr. WATSON:

There is only in the account that McLean has drawn off, and in evidence marked Exhibit D 3, the deposits and money drawn by Whitney. These two accounts in evidence marked D 3 and D 4 show all the bank account with Whitney in connection with the mortgage. The two are distinct and separate, and are so kept by the bank.

By Mr. PECK:

The account in evidenced marked Exhibit D 3 contains a portion of the account in Exhibit D 4. Neither of these accounts separately includes all the transactions of Whitney with the bank. They are distinct transactions and kept on different books.

106 Redirect by Mr. WATSON:

Every note discounted for Whitney, and for which we gave him credit, would appear in the account marked Exhibit D 3. Every note for which we paid him the money would appear in Exhibit D 4, and not necessarily in Exhibit D 3. When a note is renewed by merely paying the discount, it would not appear in account marked D 3, but would appear on D 4.

A. N. COWDIN.

It is conceded by all the parties that the testimony of Lewis McLean, in which he speaks of all the dealings of Whitney with the bank, refers only to the account as it appears upon the deposit ledger as kept by him, and from which he made Exhibit D 3.

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EXHIBIT D 3.

JANUARY & FEBRUARY, 1871.				Date.	Discount.	Paid.	Date.
Date.	Discount.	Paid.	Date.	July 5	$20,216 24	$18,716 24	July 6
19	$300	$500		8	1,000	600	13
21	600	500		17	500	500	13
23	400	400		17	1,000	800	17
3	116 24	400		22	700	1,000	17
3	200	500		26	100	500	22
6	500	400			1,000	700	
9	400	500			$34,516 24	$22,516 24	
14	500	600		Aug. 7	600	1,000	Aug. 8
18	500	300		11	500	500	10
23	500	600		18	500	700	19
25	300	400		22	500	100	25
	200	.....		25	500	1,000	25
	400	.....		26	1,000	1,000	26
	$4,916 24	$5,100			$27,916 24	$26,816 24	
March 6	500	200	March.	Sept. 1	500	600	Sept. 11
8	500	500		11	500	500	14
8	400	400		11	250	1,000	16
14	500	500		16	1,000	500	21
19	500	500		21	500	200	23
22	600	500		23	200	500	27
23	500	300		25	1,000	.....	
25	300	200			$31,866 24	$30,216 24	
28	200	116 24		Oct. 5	500	500	Oct. 5
31	500	400		14	250	250	14
	400	.....		19	1,000	1,000	19
	$9,816 24	$8,716 24		25	400	500	14
April. 5	500	500	April.	26	200	500	25
12	500	500		28	1,000	1,000	26
15	600	400			$35,316 24	$34,166 24	28
18	500	500		Nov. 11	1,000	500	Nov. 2
22	500	500		23	600	1,000	11
22	350	600		29	1,200	250	16
24	.....	500			.....	1,000	23
25	.....	300			.....	500	29
25	.....	200			.....	200	29
	$12,766 24	$12,716 24			.....	1,000	30
May 2	400	400	May.		$38,116 24	$38,616	
5	500	500		Dec. 8	500	1,000	14
9	500	500		14	500	600	20
26	1,000	600		18	350	1,200	30
26	400	500	27	26	600	.....	
27	500	500	27	30	1,200	.....	
	$16,066 24	$15,716 24		30	600	.....	
June 3	600	400	June 2		$41,866 24	$41,416 24	
7	500	400	4				
10	500	500	7		41,866 24	41,416 24	
14	500	500	10	1872.			
14	350	350	17	Jan. 6	600	500	Jan. 16
17	700	500	30	9	500	500	16
23	1,000	350	30	13	600	350	22
				16	500	600	29
	20,216 24	18,716 24		22	500	.....	
				29	600	.....	
					45,166 24	43,366 24	

Date.	Discount.	Paid	Date.
	45,166 24	43,366 24	
108 Feb'ry 1	1,200	1,200	Feb. 1
1	600	600	1
3	1,000	600	8
12	1,000	500	12
16	600	600	16
17	800	500	17
17	74 85	1,000	19
22	500	500	22
23	29 96	.....	
	50,670 95	48,866 24	
March 1	600	29 96	M'ch 1
1	200	600	1
2	75 92	1,200	5
25	1,200	1,000	18
16	1,000	600	20
20	1,200	600	20
22	500	500	22
30	500	1,000	29
	55,946 87	54,396 20	
April 2	500	500	Apr'l 2
2	200	200	3
6	500	500	6
6	700	1,200	6
6	600	500	12
8	1,000	1,200	12
10	200	74 85	19
15	325	500	24
19	450	700	29
19	300	.....	
20	500	.....	
20	300	.....	
22	1,000	.....	
22	500	.....	
24	500	.....	
25	607 35	.....	
26	500	.....	
	64,729 23	59,871 05	
May 6	1,000	607 35	May 4
8	600	500	4
14	1,000	300	6
21	500	75 92	6
21	500	600	9
25	1,000	500	9
25	1,000	200	14
.....	.....	450	14
.....	.....	300	21
.....	.....	500	23
.....	.....	500	25
.....	.....	1,000	25
.....	.....	1,000	25
.....	.....	300	22
	70,329 23	66,704 32	
June 1	500	500	June 1

Date.	Discount.	Paid.	Date.
June 1	800	500	June 1
5	600	325	1
5	500	1,000	7
8	1,000	600	13
15	1,000	1,000	15
17	600	500	22
22	500	500	22
26	1,000	1,000	27
26	1,000	.....	
	$77,829 22	72,629 32	
July 1	700	500	July 3
3	500	800	3
10	600	600	10
13	1,000	1,000	11
18	1,200	1,000	13
18	400	500	13
18	1,150	1,000	18
19	198 75	600	20
20	600	500	26
24	300	1,000	29
26	500	1,000	29
29	1,000	.....	
	$85,907 97	81,129 32	
Aug. 3	700	700	Aug. 3
5	100	500	5
12	600	600	12
14	1,000	1,000	14
23	600	1,150	14
23	350	600	26
26	500	300	28
31	1,000	500	28
.....	.....	1,000	31
	90,757 97	87,479 32	
Sept. 5	500	700	Sept. 5
5	700	400	5
6	600	500	6
14	750	600	14
14	600	1,000	18
18	1,000	198 75	21
26	600	600	26
28	850	350	28
.....	.....	500	28
.....	.....	750	30
	96,357 97	93,008 07	
Oct. 3	191	.....	
	96,548 97	93,008 07	
Nov. 11	1,000	191	Nov. 8
13	681 88	1,000	13
13	735 34	500	18
13	1,618 67	700	13
13	3,077 50	600	13
.....	.....	1,000	13
.....	.....	600	13
.....	.....	850	13
.....	.....	600	13
	103,603 36	98,049 07	

09 EXHIBIT D 3.—Continued.

1873.						1874.					
Date.		Discount.	Paid.	Date.		Date.		Discount.	Paid.	Date.	
Jan.	10	557 34	1,000	Jan.	10	20		635	64	Jan.	12
Feb.	12	357	357 34	Feb.	12	20		740	4,918 32		12
	15	680 16	691 66		15	12	Jan.	288 45	635		21
	15	735	735 34		15	12		4,800	740		21
	15	1,640 25	1,618 67		15	21		635	100	Feb.	2
	15	3,118 53	3,077 50		15	21		740	740		23
March	17	91 88	357	March	17	2	Feb.	100	635		23
			91 88		27	23		740	288 45	March	17
April	4	230	735	April	4	23		635	4,800		17
	4	4,802 41	630 16			17	M'ch.	5,100 10	635		28
	4	635 94	1,640 25			28		635	740		28
	4	741 74	3,118 53			28		740	101	Ap'l	7
	23	100				7	Ap'l.	75	635	May	1
May	10	635 94	230	May	6	1	May.	740	740		1
	10	741 74	741 74		10	1		635	75		11
	10	4,644	635 94		10	11		75	75		14
	37	100	4,802 41		10	14		45	740	June	18
			100		27	18	June.	45	635		2
June	7	740 54	741 74	June	7	19		5,253 41	45		19
	7	641 75	635 94		7	2		740	5,100 10		19
	12	4,899 97	4,644		12	2		635	45	Aug.	28
July	26	635	641 75	July	26			171,175 82	167,037 51		
	26	740	740 54		26		1872.				
	29	100	100		29	Feb.	22	.....	1,200		
August	16	4,858 80	4,899 97	August	16				168,237 21		
	16	90 19	90 19		26						
	16	635	635		16						
	16	740	740		16						
		137,643 54	133,799 84								
Aug.	26	89	89	Sept.	8						
8	Sept.	64	740		20						
20		740	635		20						
20		635	100		29						
29		100	65		27						
27		64	4,858 80	Oct.	16						
16	Oct.	.....	635		16						
16		4,918 32	740		16						
16		635	740	Nov.	19						
16		740	635		19						
Nov.	19	740	100	Dec.	1						
	19	635	635		20						
1	Dec.	100	740		20						

110 EXHIBIT D 4.

National Bank of Genesee in account with E. M. Whitney.

1871.				1871.			
Jan.							
12	To balance		7 60	24			300
17	Dis		195 79	26	Dis. 400		300
19			390	26		600	
19		500 29		27	Dis		495 33
20	Dis		594 40	27			500
20		100		27		1,000	
21		500		June			
23	Dis		396 27	1			300
23		400		2			40
Feb.				3	Dis.		594 25
1	Dis		198 13	3		950	
1		158 58		7			500
3	Dis. 500		895 16	7	Dis		495 33
3		900		7		500 20	
6	Dis		396 27	7		105	
6		400		9		17 54	
7			40	10			30
9	Dis		495 33	10	Dis		495 33
9		500		10		500	
10		24 49		10		400	
10		15		14			30
12		1,000		14	Dis		349 23
14	Dis. 500		550 95	14	Dis		495 33
14		600		14		873	
15		1,000		15			49
17			20	17			350
18	Dis		297 20	17	Dis		693 47
18		300		17			25
21			40	17		1,050	
23			600	23	Dis. 100		1,982 25
23		40 34		23		1,000	
23		600		24		100	
25	Dis		396 27	26		15	
25		400		30		850	
Mar.				31		400	
3	Dis		495 33	31		477 05	
6		200		April			
7		125		5	Dis		495 33
8	Dis		495 33	5		500	
8		650		15			465
11	Dis		396 27	15		458 50	
11		400		22	Dis. 300		1,094 40
Mar.				22		1,100 19	
14	Dis		495 33	24	Dis		495 33
14		500		24		500	
18	Dis		495 33	28	Dis		343 82
18		500		29		190	
22	Dis		495 33	May			
22		500		1		143	
23	Dis		297 20	2	Dis		396 27
23		300		2		400	
25	Dis		198 13	5	Dis		495 33
25		200		5		500	
31	Dis		396 27	8	Dis		495 33
31	Dis		595 33	9		500	
111							
July.				Sept.			
5	Dis. Gibbs		989 08	14			630
5		1,000		14		500	
6			600	16	Dis		990 33
6		600		16		1,000	
8		50		20			49 82
10			200	20		60	
12			300	21	Dis		495 16
12			120	21		500	
12		100		23	Dis		198 12
13		500		24		300	
15			500	25	Dis		986 16
15		500		25			1,000
17	Dis		982 25	25		10	
17			500	25		5	
17	Dis		693 40	25		1,000	
17		1,500		27		500	
17		700		29		230	
20			350	30		29 17	

EXHIBIT D 4—Continued.

1871.

22	Dis. 100		350
22		700, 39	
26	Dis		990 58
26		810	
Aug.			
2		170	
3			275
7	Dis. on note	5 65	
10	Dis		500
10		500	
11	Interest on note	4 70	
11		250	
18			715
18	Dis		495 27
18		500	
19		1,007 71	
19			300
22	Dis		297 10
22		250	
25			1,000
25	Dis		495 15
25		1,200	
26	Dis		982
26		1,000	
26		350	
Sept.			
1	Dis		495 16
1		70	
6			200
7		15	
8		4 00	
11	{ Gibbs 500 / Dis. 250 }		743 04
11		700	
11		600	
112			
Dec.			
14		1,600	
19		6 80	
26	Dis		594 20
26		600	
30	Dis		1,188 40
30		1,200	

1872.

Jan.			
13	Dis		594 20
15		100	
16	Dis		495 15
16		500	
16		500	
22	Dis		495 29
22		350	
29	Dis		594 35
29		600	
31		100	
Feb.			
1	Dis		1,780 10
1		1,200	
22	Dis		700 16
22		500	
29	Dis		594 20
29		600	
Mar.			
30	Dis Gibbs		500
April			
2			800
2		1,300	
6	{ Dis. Gibbs 8500 / " Lathrop 700 / " 600 }		1,783 38
6		1,800	
8	Dis		984 91

1871.

Oct.			
3		18 85	
4			47 75
5	Dis		495 16
5		500	
10		240 48	
14	Dis		247 55
14		250	
17		25	
19	Dis		990 58
19		1,000	
20			20
25	Dis		495 29
25		500	
26	Dis		198 11
26		200	
28	Dis		1,013 57
28		1,000	
30			38 50
31		5	
Nov.			
1		46 40	
9			500
9		500	
16			250
16		250	
22			400
23	Dis		594 20
23		1,000 56	
29			500
29	Dis		1,188 40
29		1,700 56	
Dec.			
13			350
14			175
14	Dis		495 29

1872.

May			
14	Dis. Lathrop		990 33
14	G. W. Mather's note	72 80	
14		200	
15		360	
16		15	
16		381 29	
21	{ Dis Lathrop 500 / " 500 }		990 58
21		800	
25	{ Dis. 1,000 / 1,000 }		2,006 80
23		2,100	
31		150	
June			
1	{ Dis. Gibbs 800 / " 500 }		2,287 26
1		2,336 80	
5	{ 500 / Dis. 600 }		1,088 65
5		825	
8	Dis Lathrop		989 33
8		1,000	
8		3 36	
10		300	
15	Dis. Lathrop		989 33
17	Dis		594 35
17		600	
17		900	
23	Dis		495 15
23		500	
26	Dis		1,980 12
26		700	
27		1,500	
July			
1	Dis		693 15
1		700	
3	Dis		496 15
3		500	
10	Dis		594 20

EXHIBIT D 4.—Continued.

1872.			
8		1,000	
9			980
10		930 66	
15	Dis		330 47
15		315 94	
19	Dis. Lathrop $400 / " 300		743 68
19		744 85	
24	Dis		495 16
24		500	
May 6	Dis. Lathrop		990 33
6		375 92	
8			70
8	Dis		594 20
9		900	
11		45	
11		200	
213			
July 23			1,000
23		1,005 62	
24	Dis		297 10
24		300	
26	Dis		495 29
26		500	
27		10	
29	Dis		990 33
29		1,000	
Aug. 1		1 56	
3	Dis		693 15
3		700	
5	Dis		500
5		500	
10			1,080
12			597
12	Dis		594 20
12		1,100	
14	Dis		990 33
14		2,150	
19	Revenue stamp	50	
23	Dis		594 20
23		600	
26	Dis		346 55
26		330 10	
30			16
29		8	
30		84 78	
31	Dis		990 33
31		1,000	
Sept. 4		6 18	
5			88 39
14	Dis $750 / " Gibbs 600		1,334 41
14		1,350	
20	Stamp on mort	5	
Nov. 8	Insurance	50	

1872.			
10		600	
13	Dis. Gibbs 1,150 / " 1,000		1,490 33
13			136 35
13		1,621	
16			288
16			123
16		400	
18	Dis		1,573 02
19		300	
20		1,200	
20		30	
1873.			
Mar. 31	Recording mort	1 25	
April 4			12 15
7			52
1874.			
Aug. 8	Insurance	156	
Nov. 28			10 49

114 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY, HOMER BOSTWICK, Ebenezer M. McCormick, The National Bank of Genesee of Batavia, and others.

Exceptions taken by the National Bank of Genesee of Batavia to the report of W. W. Rowley, esq., referee, to whom it was referred to report claims and priorities and rights of claimants on surplus money arising from the foreclosure in the above entited action of a mortgage upon certain lands and real estate situate in Genesee County, which said report was filed in Genesee County clerk's office on or about November 8, 1875.

FIRST EXCEPTION.

For that the said referee has in and by his said report certified and reported that the claimant, the National Bank of Genesee, has no claims or liens upon the surplus moneys in this action; whereas he should have certified and reported that the said The National Bank of Gene-
115 see has a full and valid lien upon and right to said surplus moneys, and the whole thereof, prior, paramount, and superior to that of each and all other claimants and parties whomsoever; and whereas he should have certified and reported that the said National Bank of Genesee is entitled to said surplus moneys, and to the whole thereof.

SECOND EXCEPTION.

For that the said referee has, in and by his said report, certified and reported that the note introduced by the claimant, the National Bank of Genesee, of $5,160.10, is void, whereas he should have certified and reported that said note is valid and not void.

THIRD EXCEPTION.

For that the said referee has, in and by his said report, certified and reported that the two notes introduced by claimant Bostwick, one for $740 and one for $635, each dated June 2, 1874, are void, whereas he should have reported that the same, and each of them, are valid.

FOURTH EXCEPTION.

For that the said referee has certified and reported, in and by his said report, that the said McCormick's mortgage takes precedence to the National Bank mortgage, whereas he should have reported the mortgage of said The National Bank of Genesee takes precedence.

116 FIFTH EXCEPTION.

For that as to the priority of the liens of the Bostwick mortgage, the McCormick mortgage, and the mortgage of the National Bank of Genesee, the said referee, in and by his said report, find that the Bostwick mortgage is first, the McCormick mortgage second, and the National Bank of Genesee mortgage is third; whereas he should have found and

reported that as between said mortgages that of the said The National Bank of Genesee is first.

SIXTH EXCEPTION.

For that said referee, in and by his said report, finds and reports that Homer Bostwick is entitled to $2,500 of such surplus moneys, and has the first lien thereon.

That Ebenezer M. McCormick is entitled to the second lien on such surplus moneys and to $1,500 thereof, John W. Mix to $1,234.83 thereof, and that he has the third lien thereon; and claimant Joshua and John P. P. Lathrop are entitled to $1,586.78, with interest from April 3, 1873, of such surplus moneys, and have the fourth lien thereon, and that the surplus moneys be paid to the claimants as above named, so far as sufficient; whereas he should have reported and found that the said $5,000 mortgage of said National Bank of Genesee, by virtue of said mortgage, was and is first, and that said surplus moneys should be paid to the claimant, the National Bank of Genesee.

117 SEVENTH EXCEPTION.

For that the said referee, in and by his said report, has certified and reported that the indebtedness of said Whitney, amounting to $5,160.16, June, 1874, no part of which has been paid, "is made up of renewals of former liabilities some part of which has existed since May, 1872," whereas the evidence establishes, and the referee should have reported and certified, that of said indebtedness the sum of $3,200 (being Whitney's indebtedness to said bank at the time of the execution and delivery of the said mortgage) has existed ever since said mortgage was made and no part thereof has been paid, and that the same indebtedness of $3,200 has been existing and kept in life ever since said mortgage was made, and is a part of the indebtedness secured by said mortgage.

EIGHTH EXCEPTION.

For that said referee has reported and certified that the said "bank holds no security for said indebtedness of $5,160.10 other than the mortgages;" whereas the evidence established, and the referee should have reported, that the said bank holds and has held the personal security, to wit, the promissory note of said Whitney, for said indebtedness secured, or intended to be secured, by said mortgage, for which said bank did receive and take the promissory note of said Whitney, and still holds his promissory note for the same.

118 NINTH EXCEPTION.

For that the said referee has certified and reported that Ebenezer M. McCormick at the time of receiving the mortgage from said Whitney had no knowledge of the mortgage to the National Bank of Genesee, whereas the evidence established and the said referee should have certified and reported that McCormick had received notice and well knew of said mortgage to said bank at the time when he was first aware that the mortgage to him was executed.

TENTH EXCEPTION.

For that the said referee has reported and certified that the indebtedness of Whitney to the bank amounting to $3,200, existing at the time the mortgage was given by Whitney to the bank, was paid before the execution by Whitney of either of the subsequent mortgages, whereas the evidence establishes and the referee should have reported and certified that said indebtedness of $3,200 of Whitney to said bank was never paid, but still exists.

ELEVENTH EXCEPTION.

For that the said referee has in and by his said report certified and reported that all the debits and credits of the said Whitney in his dealings with said bank, including discounts made at said bank, were made and kept by said bank in said Whitney's general account; whereas the evidence established and the said referee should have reported
119 that all of the discounts made by said Whitney were entered and kept by said bank by themselves in a separate account in a separate book and not entered into his general account in the books of said bank.

In all of which particulars the report of the said referee is, as the said The National Bank of Genesee is advised and claims, erroneous.

Dated November 15th, 1875.

WILLIAM C. WATSON,
Attorney for said The National Bank of Genesee of Batavia.

Exceptions to referee's last report.

Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

The defendants, Edward M. Whitney, Joshua and John P. P. Lathrop, except to the report of W. W. Rowley, esq., referee herein, dated November, 1875, as follows:

120 First. They except to the conclusion of law of said referee, that the Bostwick mortgage is a valid security to him for indorsements not exceeding $2,500, but that he should have found as a conclusion of law that said mortgage was not a valid mortgage to him for indorsements for any sum whatever as against the said Whitney and Joshua and John P. P. Lathrop.

Second. They except to the conclusion of law of the said referee that the McCormick mortgage is a valid security to him for indorsements not exceeding $1,500, but that he should have found as a conclusion of law that said mortgage was not a valid security to him for indorsements for any amount whatever as against the said Whitney and Lathrops.

Third. They except to the conclusion of law of said referee "that the note of $430, dated May 28th, 1874, made by Whitney and indorsed by McCormick, is a valid note under the McCormick mortgage," but that he should have found as a conclusion of law that said note is not a valid note under said mortgage as against said Whitney and Lathrops.

Fourth. They except to the conclusion of law of said referee "that the judgment entered in favor of John P. P. Lathrop against Ed-
121 ward M. Whitney, for $1,046.42, on the 3d day of April, 1873, in

the clerk's office of Genesee County, is void," but that he should have found as a conclusion of law that said judgment is a good and valid judgment, and is the third lien on said surplus moneys.

Fifth. They except to the conclusion of law of said referee "that as to the priority of the liens of the three mortgages (i. e. the Bostwick, McCormick, and the National Bank of Genesee), I find the Bostwick mortgage is first, the McCormick mortgage is second, and the National Bank of Genesee mortgage is third," but that he should have found that none of said mortgages are liens.

Sixth. They except to the conclusion of law of said referee "that the situation of the claimants, Joshua and John P. P. Lathrop, is such that they cannot attach the liens prior to them on the ground of usury," but that he should have found as a conclusion of law that their situation is such that they can attack prior claims on the ground of usury.

Seventh. They except to the conclusion of law of said referee "that the claimant, Homer Bostwick, under and by virtue of the mortgage executed to him by Whitney, is entitled to $2,500 of such surplus moneys, and that said mortgage is the first lien thereon," but that
122 he should have found as a conclusion of law that said Bostwick mortgage is not a lien on said surplus moneys, and that said Bostwick is not entitled to any part of said surplus moneys under and by virtue of said mortgage as against the said Whitney and Lathrops.

Eighth. They except to the conclusion of law of said referee "that the claimant, Ebenezer McCormick, under and by virtue of the mortgage executed to him by Whitney, is entitled to $1,500 of such surplus moneys, and that said mortgage is the second lien thereon," but that he should have found as a conclusion of law that said McCormick is not entitled to any part of said surplus moneys under and by virtue of said mortgage, and that said mortgage is not a lien thereon as against the said Whitney and Lathrops.

Ninth. They except to the conclusion of law of said referee "that the mortgage executed to Whitney by Joshua and John P. P. Lathrop, of $1,586.78, dated April 3, 1873, is the fourth lien on said surplus moneys," but that he should have found as a conclusion of law that said mortgage is the second lien on said surplus moneys, and next after the lien of the John W. Mix judgment, and prior to the lien of the Bostwick, McCormick, and National Bank of Genesee mortgages.

Tenth. They except to the report of the said referee because he has not found as a conclusion of law that the John P. P. Lathrop
123 judgment of $1,046.42 is the third lien on said surplus moneys, and next after the Lathrop mortgage, and prior to the Bostwick, McCormick, and National Bank of Genesee mortgages, as he should have done under the law and evidence herein.

Eleventh. They except to the conclusion of law of said referee "that the surplus moneys be paid to the claimants in the order and amounts above named, so far as the same is sufficient," but that he should have found as a conclusion of law that the said surplus moneys be paid as follows: First, the John W. Mix judgment; second, the Lathrop mortgage; third, the Lathrop judgment, so far as the same is sufficient.

Dated November 16th, 1875.

JOHN R. OLMSTED,
Attorney for Whitney and J. and J. P. P. Lathrop, Claimants, Le Roy, N. Y.

L. N. BANGS,
Of Counsel.

124 Supreme court, Genesee County.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

Exceptions taken by Ebenezer M. McCormick to the report of Wm. W. Rowley, esq., referee, to whom it was referred to report.

Ebenezer M. McCormick, one of the claimants to the surplus money arising from the sale of the mortgaged premises in this action, excepts to that part of the referee's report, filed on the 8th day of November, 1875, wherein said referee finds and reports as a matter of law that the note introduced by the claimant, McCormick, for $1,034.30, dated May 28th, 1874, is void, whereas he should have reported that the same was a good and valid note.

Said claimant also excepts to that part of said report whereby the said referee finds as a matter of fact that the First National Bank of Batavia did exact and receive from said Whitney, upon dis-
125 counting the note of $1,000, held at the time said mortgage to said McCormick was given to him, a greater rate of interest than 7 per cent. per annum.

Dated November 16th, 1875.

TAGGART & DAY,
Attorneys for Claimant, Ebenezer M. McCormick.

Supreme court.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

Homer Bostwick, one of the claimants of the surplus moneys in this action, by M. H. Peck, his attorney, hereby excepts to that portion of the report of W. W. Rowley, referee, filed in Genesee County clerk's office, November 8th, 1875, in proceedings to obtain said surplus moneys, in which said referee finds and decides as matter of law that the three notes in said report referred to, one of $740 and one of $635, each dated June 2d, 1874, held by the National Bank of Genesee,
126 and one of $1,228.97, held by First National Bank of Batavia, made by said Whitney, and indorsed by said Bostwick, are and each of them is void, and each and every portion thereof.

Dated Nov. 16th, 1875.

H. BOSTWICK,
Claimant,
By M. H. PECK,
His Att'y.

Supreme court, ss:

At a special term of the supreme court, held at Rochester, Monroe County, on the 3d day of March, 1876.

Present, Hon. David Rumsey, justice presiding.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

The exceptions of the several claimants to the surplus funds arising

from the sale of the real estate under the decree in this action to the report of W. W. Rowley, esq., to whom the same was referred, having been brought to a hearing; after hearing Mr. Taggart for the
127 claimant, McCormick; Mr. Peck for the claimant, Bostwick; Mr. Watson for the claimant, the National Bank of Genesee; and Mr. Olmsted for the claimants, the Lathrops, it is ordered that the exceptions filed by claimant, the National Bank of Genesee, to the said report be, and the same are, disallowed and overruled.

That the exceptions filed by the claimant McCormick to the said report be and the same are allowed.

That the exceptions filed by the claimant Bostwick be and the same are allowed.

That the exceptions filed by the defendant Whitney, and the claimants Joshua and John P. P. Lathrop, to the said report be and the same are disallowed and overruled. And it is further ordered that the said report of the referee be amended by striking out therefrom the following conclusions of law found by the referee, viz: "That the notes introduced by the claimant, Bostwick, one for $740, one for $635, each dated June 2d, 1874, and the other for $1,288.99, dated May 28th, 1874, are void. That the note introduced by the claimant McCormick, for $1,034.30, dated May 28th, 1874, is void."

And that the said report, as so amended, be in all things confirmed.

And it is further ordered that the costs and charges of the referee be first paid out of the said surplus funds, and that the residue thereof be applied to pay the said sum of $2,500, to which the said claimant,
128 Bostwick, is entitled as found by the said referee, after which the claimant, McCormick, is to be paid the sum of $1,500, to which he is entitled as found by said referee, or so much thereof as the remainder of such surplus funds will pay; and if any balance shall remain after making such payments, that the claim of the claimant, Mix, as found by the referee, be paid from such surplus funds.

C. A. HULL, *Clerk.*

Opinion.

Supreme court. Monroe special term, February, 1876.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

D. Rumsey, justice:

On the sale of the premises described in the complaint a large surplus was realized, which is claimed by several parties. One report
129 made by Mr. Rowley has been sent back to him upon exceptions taken to it, and he has made another report, which was filed on the 8th day of November, 1875, and several of the parties have filed exceptions to the same.

The Genesee National Bank, one of defendants, files eleven exceptions to the report. The bank holds a mortgage made by defendant, Whitney, to it Jan. 12, 1871, recorded Sept. 19, 1872, to secure it for money then due to it from Whitney, and for such other sums as it should thereafter advance to him. The referee reports that the amount due to the bank at the time of the execution of the mortgage has been fully paid. He also finds that the bank did not advance any amount at the time that the mortgage to it was executed, and did after the execution

of the mortgage, and upon the faith of it, advance to Whitney divers sums, of which some $5,000 and over was unpaid.

The facts thus reported by the referee in relation to the dealings of Whitney with the bank are fully sustained by the evidence taken before him. The national bank law authorizes institutions chartered under its provisions to take mortgages only to secure debts actually due to them before the execution of such mortgage, and its several provisions are evidently intended to require that their discounts shall only be upon personal security, and prohibits them from doing a banking business upon a pledge of real estate. This view of the provisions of the law is fully sustained by the ruling of the court in the case of the Kansas Valley National Bank of Topeka against Bowell, assignee, &c. (12 Dillon's Rep., 371, and Ripley vs. Harris, 3 Bissell, 199, 402.)

130 The referee's report on the facts, and the national banking act, and these decisions on the law, fully dispose of the several exceptions made by the bank to the report of the referee, and they are accordingly overruled. It is not necessary to pass upon the question whether the note held by the bank against Whitney for $5,760 is void or not. The only material question is whether the mortgage is a valid security for it or not, and as under the decisions above cited it is not, the bank has no lien upon the surplus funds for it. I doubt whether the finding of the referee, that as a matter of law the note is void, is sound.

The referee finds that Bostwick holds a mortgage made by Whitney to him on the 16th day of September, 1872, recorded same day at 12 m., to secure the payment of all liabilities and indebtedness already or thereafter incurred by him for Whitney to the extent of $2,500, and then finds that Bostwick before and after the execution of such mortgage incurred liabilities for Whitney to the amount of $2,500 and over; but he finds that as the bank exacted from the maker of the notes so indorsed by Bostwick more than seven per cent. interest upon the discount of them, that they are void. He holds, however, correctly, that the claimants, subsequent to the mortgage of Bostwick, are not in a condition to insist upon the invalidity of such notes for usury, and that notwithstanding such usury Bostwick is entitled to receive of the surplus the $2,500 secured to him by the mortgage.

131 The referee is probably at fault in his view of the law governing the business operations of national banks. That the notes referred to by the referee in his report are not so tainted with usury as to render them void has been fully settled by the Supreme Court of the United States in the case of Farmers & Mechanics' Bank vs. Dearing, not yet reported except in 12. Albany Law Journal 310.

The exception of Bostwick that such notes are void for usury is therefore well taken and should be allowed, but as such exception will not affect the final result arrived at by the referee, there is no necessity of sending the report back to the referee to be corrected in that respect. He gives to Bostwick the $2,500 to which he is entitled under his mortgage, and it is immaterial to him that is so given to him upon incorrect principles or for an unsound reason.

Bostwick, as found by the referee, knew of the mortgage to the bank at the time he took the one from Whitney to himself on the 16th September, 1872, but as the bank mortgage created no lien upon the property or the surplus, for the subsequent debt of the bank, this is of no consequence. The claim of the bank under its mortgage has been fully satisfied by the payment of the debt due to it from Whitney at the time it was executed, and thereby ceased to be a lien upon the premises.

The claimant McCormick held a mortgage executed by Whitney to

him to secure him for indorsements, &c., made for Whitney by
132 him to the amount of $1,500, similar to the one to Bostwick, recorded after the Bostwick mortgage, but bearing the same date. The referee finds that McCormick was liable on the notes of Whitney as indorser to the amount of $1,500, but that a portion of the notes thus indorsed by him were void for usury, and he arrives at the same conclusion in this case as in the Bostwick case, and holds that McCormick is to be paid next in order after Bostwick. McCormick excepts to the finding of the referee that such notes are void for usury, and for the reasons before given his exception is to be allowed as well taken, and the report need not be sent back to the referee.

The referee finds in regard to the claims of Bostwick and McCormick thus allowed by him as the first and second liens on the surplus, that they have not paid the several amounts indorsed by them for Whitney before the claims of Mix and Lathrop were docketed as liens upon the mortgage premises, but that they still exist unpaid. That Bostwick and McCormick are still liable for the same amounts. It can make no difference with their equities that they have carried the debts along by other indorsements. The liability for the same debts still exists, and no sufficient reason can be conceived of why they should not be protected against such liability by the security afforded to them under their several mortgages. Judge Barker has, in his opinion upon the exceptions taken to the first report of the referee, very satisfactorily disposed of that question, and I do not deem it necessary to examine it further.

133 The claims of the claimants Bostwick and McCormick, under their mortgages, amount to $4,000, which is more than the whole amount of the surplus fund to be distributed, and it is therefore a matter of no moment to the claimants, Mix and Lathrops, what was held by the referee in regard to their several claims. The holding of the referee in regard to the judgment in favor of the Lathrops against Whitney that it is void, must be deemed as affecting only the validity of judgment in reference to the claims of the creditors of Whitney, and not as between Whitney and the Lathrops, and will not affect their rights as against Whitney.

It is in no sense an adjudication of the rights of Lathrop under the judgment, except so far as it affects their rights to this surplus money, and as in my view of the case they are not entitled to any part of that fund, and it will all be absorbed by claims prior to theirs, they have the right to except only to some finding of the referee which if allowed would give them some right to the surplus or some portion of it.

Their exceptions to the report are therefore overruled.

The result is that the report of the referee, so far as it holds that any of the notes indorsed by the claimants Bostwick and McCormick for Whitney are void for usury, it is entirely unwarranted and immaterial and must be struck out of the report, and as such findings do not affect in any wise the result to which the referee has arrived, and his report as to such results is correct as so amended, it is in all things confirmed.

134 No costs are allowed to either of the claimants. The referee's fees may be deducted from the surplus and the residue be distributed as directed by the referee.

L. RUMSEY, *Clerk.*

Supreme court.

MARIA CROCKER
against
EDWARD M. WHITNEY AND OTHERS.

Please take notice that the National Bank of Genesee of Batavia hereby appeals to the general term of the supreme court from the order, and each and every part thereof, made at a special term of said court held at the city of Rochester, Monroe County, March 3d, 1876, by Hon. David Rumsey, and entered in Genesee County clerk's office on the 6th day of March, 1876, which said order among other things disallows and overrules the exceptions filed by the National Bank of Genesee of Batavia, one of the claimants to the surplus funds arising from the sale of the real estate under the decree in this action, to the
135 report of W. W. Rowley, to whom it was referred to ascertain and report as to the amount and priority of the respective claims and liens upon said surplus money, and which order directs that the report of the referee be amended as directed in said order and that said report as so amended be in all things confirmed.

Dated the 1st day of April, 1876.

WILLIAM C. WATSON,
Attorney for the Claimant, The National Bank of Genesee of Batavia.

To M. H. PECK, Esq.,
Attorney for the Claimant, Homer Bostwick.
TAGGART & DAY, Esqs.,
Attorneys for the Claimant, Ebenezer M. McCormick.
JOHN R. OLMSTED, Esq.,
Attorney for Defendant, Whitney, and the Claimants, Joshua and John P. P. Lathrop.
TARBOX & SHERWIN, Esqs.,
Attorneys for the Claimant, John W. Mix, and
CARLOS A. HULL, Esq.,
County Clerk of Genesee County.

136 STATE OF NEW YORK,
Genesee County Clerk's Office:

I, Carlos A. Hull, clerk of the county of Genesee, of the county court of said county, and of the supreme court, both being courts of record, having a common seal, do hereby certify that I have compared the copy of the referee report, exceptions, orders and notice of appeal hereunto annexed, with the originals on file in this office, and that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof I have hereunto set my hand and affixed the seal of said county, at Batavia, this 29th day of May, 1876.

[SEAL.] C. A. HULL, *Clerk.*

Filed March 28, 1877.

137 Supreme court State of New York.

At a general term of the supreme court, fourth judicial department, held at the court-house in the city of Rochester, Monroe County, on the 13th day of October, 1876.

Present, Hon. Joseph Mullen, presiding justice; Hon. E. Darwin Smith, Hon. John L. Talcott, associate justices.

MARIA CROCKER
vs.
EDWARD M. WHITNEY ET AL.

Order of special term affirmed with $10 costs and disbursements on opinion of special term.
Copy:

B. F. FREEMAN,
Sp. Dp. Clerk.

Filed Oct. 23, 1876.

138 GENESEE COUNTY,
Clerk's Office, ss:

I certify that I have compared the within notice of appeal, appeal papers, & order with the respective originals thereof on file in this office, & that the said copies are respectively correct transcripts therefrom, & of the whole of said respective originals.
In testimony whereof I have hereunto set my hand & affixed the seal of the supreme court for the said county, this 29th day of March, A. D. 1877.
[L. S.] C. A. HULL, *Clerk.*

At a special term of the supreme court of the State of New York, held at the court-house in the village of Batavia, in & for the county of Genesee, on the 26th day of November, 1877.
Present, Hon. Albert Haight, justice.

MARIA CROCKER
ag't
EDWARD M. WHITNEY ET AL.

On reading & filing remittitur in this cause sent down from the court of appeals, ordered, that the order & determination of the said court of appeals affirming with costs the order of the general term of this court appealed from, be & the same hereby is made the order and decision of the supreme court.

Filed Nov. 26, 1877.

139 Supreme court.

MARIA CROCKER
ag't
EDWARD M. WHITNEY & OTHERS.

NOV'R 30TH, 1877.

An appeal having been taken by the defendant, The National Bank of Genesee of Batavia, to the court of appeals, from an order of the general term of this court, duly made & entered in Genesee County clerk's office, on the 23d day of October, 1876, affirming, with $10 costs & disbursements, an order of the special term of this court, duly made & entered in said clerk's office on the 6th day of March, 1876, overruling the exceptions of the said defendant, The National Bank of Genesee of Batavia, to the referee's report, theretofore made & filed herein, & confirming said report as to the disposition of the surplus moneys arising from the sale of real estate in this action, awarding said surplus moneys

to the defendants Homer Bostwick & Ebenezer M. McCormick, after deducting therefrom the fees of the referee in the manner in said order prescribed; & the record having been duly remitted from said court of appeals to this court, and the order & decision of said court of appeals having been duly made the order & decision of this court: Now, on motion of Mr. M. H. Peck, of counsel for the defendants Homer Bostwick and Ebenezer M. McCormick, the respondents in said appeal, it is ordered that the aforesaid order of the general term of this court be & the same is in all things affirmed; and it is further ordered that said respondents do recover of said appellant, The National Bank of Genesee, of Batavia, the sum of $110.00 for their costs & disbursements on said appeal to the said court of appeals.

Filed Nov. 30, 1877.

140 STATE OF NEW YORK,
Genesee County Clerk's Office, ss:

I certify that I have compared the annexed writ of error, citation, remittitur, appeal papers, orders, opinion & certificate, with the respective originals thereof on file in this office, & that the same are respectively correct transcripts thereof, & of the whole of said respective originals.

In testimony whereof I have hereunto set my hand & affixed the seal of the supreme court for the county of Genesee, in said State, this 2d day of May, A. D. 1878.

[SEAL.] CARLOS A. HULL, *Clerk.*

141 State of New York. In court of appeals.

MARIA CROCKER *ag'st* EDWARD M. WHITNEY.

I hereby certify that in the proceedings on the appeal before this court, in the action above entitled, it was claimed on the part of the appellant, The National Bank of Genesee, that under and by virtue of the act of Congress, entitled "An act to provide for a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864 (ch. 106), the said bank possessed the right and privilege of taking and holding mortgages of real estate, given to such bank as security for future loans to be made by such bank to the mortgagors, or future indebtedness to be incurred by said mortgagors to said bank, and that the mortgage of the defendant Whitney to the bank, mentioned in the record, was valid, notwithstanding all the indebtedness of Whitney to the bank at the time when the mortgage was given had been paid by Whitney, and that the said bank was entitled to the fund in question, as having the first lien
142 thereon, to the full amount thereof. That on the part of the respondents in said appeal it was claimed that the appellants had no such right or privilege under the said act of Congress, and that said mortgage was therefore void. That this court sustained the position of the respondents, and held that the appellants had no such right or privilege under said act of Congress as it is claimed, and that the mortgage of Whitney to the appellant was therefore void, and on that ground alone affirmed the order of the supreme court appealed from, denying any claim of the appellant to the fund in question, or any part of it, and

directing its payment to the respondents in the order of the date of their liens.

Dated Jan'y 21, 1878.

SANFORD E. CHURCH,
Ch. J. Court of Appeals.

(Indorsed:) State of New York. Court of appeals. Crocker vs. Whitney. Certificate. Filed , 1878.

143 Court of appeals.

MARIA M. CROCKER
vs.
EDWARD M. WHITNEY AND OTHERS.

IN RE THE NATIONAL BANK OF GENESEE, appellant,
vs.
HOMER BOSTWICK AND OTHERS, RESPONDENTS.

ANDREWS, Justice:

The National Bank of Genesee, on the 12th day of January, 1871, when the mortgage from Whitney to the bank was executed, held his endorsed paper, which it had previously discounted for him, to the amount of $3,200.

The mortgage was given to secure this indebtedness, and also any debts of the mortgagor to the bank thereafter contracted.

It is conceded that the mortgage was a valid security for the notes of Whitney held by the bank at its date; but it is claimed, and the referee has found, that these notes were subsequently paid; and unless
144 the bank is entitled to have this finding set aside, its right to the surplus money arising on the sale under the judgment in this action will depend upon the question of the validity of the mortgage, regarding it as a mortgage to secure future loans or discounts under the provisions of the act of Congress known as the national bank act of June 3rd, 1864. If valid in that view, the right of the bank to priority of payment out the fund is conceded; but the respondents, who are mortgagees of Whitney subsequent to the bank, contest the validity of the bank mortgage as a security for future liabilities, and reposing upon this claim and the findings of the referee that the debt owing by Whitney to the bank at the date of the mortgage has been paid, they insist that, disregarding the debt subsequently incurred and now owing by Whitney to the bank, they are entitled to have the surplus money applied upon their mortgage, and that the claim of the bank thereto should be rejected.

145 The appellant claims that the finding that the indebtedness of Whitney to the bank at the date of the mortgage has been paid is not sustained by the evidence, and that in fact it entered into and forms a part of the debt of $5,160.10 now owing by Whitney to the bank, represented by his note for that amount of June 18th, 1874; and they further claim that if the original debt is regarded as paid, the mortgage, nevertheless, is an authorized and valid security under the national bank act for the debt of Whitney to the bank, incurred after it was executed.

We are of opinion that, upon the facts proved, the notes of Whitney

held by the bank when the mortgage was given were paid, and the referee was amply justified in his conclusion upon that question. Whitney was a miller & manufactured flour for sale, he was a dealer with the bank. The bank discounted his notes, and passed the proceeds to his credit on its books. He drew drafts on his customers, which the bank received & credited to him, and he deposited in the bank
146 money received in his business. The items of credit and debit were entered in a single account, and it was the usual & so far as appears the uniform practice that when his notes matured they were charged in his account and afterwards surrendered. The notes held by the bank January 12th, 1871, according to the usual custom, were not protested, but as they matured were charged to his account, & were afterwards surrendered, and his credit on the books of the bank made up of this blended fund derived from discounts, drafts and deposits, was in consequence reduced to the extent of the paper charged against it.

There was no indorser on the notes discounted after January 12th, 1871. They were discounted on the credit of Whitney, and in reliance on the mortgage. The debit side of the account from January, 1871, to August, 1874, amounted to $171,175.82, and the credits to $168,237.51. It is, we think, a clear proposition, in view of these facts, that the notes held by the bank in January, 1871, were paid. The credits to Whitney were applied to the payment of the notes as they matured.
147 There is no other inference to be drawn from the acts of the bank. If the notes were not deemed to be paid, why were the endorsers discharged and the notes given up? It was not the case of a mere renewal of notes. The transaction does not differ in legal effect from what it would have been if Whitney, having funds in the bank, had, as each note matured, drawn his check upon the bank for the amount, and delivered it to the bank, and the bank had received it, and charged it to his account, and then surrendered the note.

We deem it unnecessary to consider the rule for the application of payments when neither party have made the application. In this case there was by force of the transaction and the manner of keeping and dealing with this account an appropriation of the credits pro tanto to pay the maturing notes by the consent of both debtor & creditor, and this in law was payment. The consent is inferable from the manner in which the business was conducted. There is no ground for the
148 inference that the bank intended to keep alive the debt existing when the mortgage was given; for it is evident that it relied upon the mortgage as a valid security for the final balance of the account, and for debts which might be contracted after its execution as well as those existing at that time.

We conclude, therefore, that the finding of the referee that the bank debt owed by Whitney when the mortgage was given was afterwards paid cannot be disturbed. (See Clayton's case, 1 Duer, 600; Trescott vs. King, 6 N. Y., 147.) We come then to the only remaining question in the case, viz: Whether national banks are prohibited by the act of June 3rd, 1864, from taking a mortgage on real estate as security for loans or discounts, which the bank may thereafter make to the mortgagee. The business of a banking corporation necessarily involves the making of contracts, the loaning of money, and the existence of the relation of creditor and debtor between the bank & its customers.

A corporation has incidentally at common law, in the absence of any restriction imposed by its charter or implied from the nature
149 and objects of the corporation, the power to take and hold real

estate, and may deal in respect to it to the same extent as a natural person. (2 Kent, 281; Aug. and Ames on Corp., paragraph 145.)

A banking business or trading corporation, having the right to make contracts and to secure creditors, may secure their debts by taking a mortgage on real estate, or in any way provided for by the convention of the parties, and we see no reason to doubt that a bank, unless restrained by its charter, may take a mortgage in advance to secure anticipated liabilities as well as those existing at the time. This is a convenient and ordinary method, when a continuous dealing upon credit is contemplated, of recovering the final indebtedness, but the legislature, by whose fiat the corporation exists and whose creature it is, may prescribe and regulate the mode of its operation and in what manner its power shall be exercised. It may, by special restriction in the charter, define & limit the incidental powers which the corporation shall possess, and so far as this is done the statute & not the common law will
150 determine what their powers are. (Bank U. S. vs. Dandridge, 12 Wheat., 64; Head vs. Prov. Ins. Co., 2 Cranch, 127.)

It follows from this familiar doctrine in respect to the powers of corporations that in the absence of any restriction in the national bank act upon the power of national banks to take mortgages on real estate to secure future loans or discounts, the power to do so cannot be successfully challenged, and those who deny that the power exists must show that its exercise is prohibited or restrained by the statute under which the banks are organized.

We come, then, directly to the consideration of this question. The 8th section of national bank act specifies the banking powers of institutions organized under it, viz, to carry on the business of banking by discounting & negotiating promissory notes, dratts, bills of exchange, & other evidences of debt, by receiving deposits, by buying & selling exchange, coin & bullion, by loaning money on personal security, & by obtaining, issuing, & circulating notes according to their title, & they are especially authorized to exercise all such incidental powers as shall be necessary to carry on the business of banking. The words "personal
151 security" used in the section are manifestly, we think, used in contradistinction to real security, & define the description of securities upon which loans by national banks are to be made. Loans upon individual credit or upon the pledge or security of personal property are within the description, but loans made upon a real estate mortgage are loans upon real security, whether the mortgage is regarded as conveying to the mortgagee an estate in the land, as in some of the States, or as creating a lien simply to be enforced by foreclosure and sale, as in this.

This specification of the banking powers of national banks is very similar and nearly identical with the specification in the general banking law of this State of 1838. It differs in this, under our State law among other powers specified was this, loaning money on real & personal security.

The change in the national bank act, which was framed doubtless with the knowledge of the provisions of our State law, is significant of the intention of Congress to restrict national banks to loaning upon personal as distinguished from real security.

152 If the argument upon the point we are considering rested solely upon the language of the 8th section of the national bank act it might be strongly pressed that the authority to loan on personal security being specified, a prohibition was implied against loaning on real security, & that upon this ground alone the mortgage in question could

not be held a valid security for Whitney debt to the bank contracted after the mortgage was given. Upon this point the language of chief justice Thompson in The People vs. the Utica Ins. Co. (15 John. 383), where the point was whether the insurance company could under its charter exercise banking powers, is very suggestive. He says the specification of certain powers (in a charter) operates as a restraint to such objects only, and is an implied prohibition of the exercise of other & distinct powers. And in New York Firemen's Ins. Co vs. Ely (2 Cow. 300), Sutherland, justice, referring to the claim that the company was not prohibited from investing its surplus funds in loans upon promissory notes, said: The 16th section of the act expressly provides that it shall be lawful for the corporation to invest their capital or any portion
153 of it either in the stock of the United States or of the individual States, thus by the strongest implication prohibiting any other mode of investment, and destroying the inference which might have resulted from the absence of all regulations on the subject. But we are not required to decide in this case whether the taking of a mortgage by a national bank to secure future loans is prohibited by the true construction of the 8th section of the act, standing alone, but a reference to the 28th section of the act in connection with the 8th section makes it very clear that it was the intention of Congress to prohibit taking by a national bank of a real estate mortgage for that purpose. That section is as follows: It shall be lawful for any such association to purchase, hold, & convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

154 Fourth. Such as it shall purchase at sale under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage or the title and possession of any real estate purchased to secure any debts due it for a longer period than five years.

It is apparent on reading this section that it was the intention of Congress to enable national banks to acquire real estate for a bank building and accommodations and in payment of or to secure debts existing when the title was acquired, and to prohibit them from purchasing or holding lands under any other circumstances.

The second specification must be construed as prohibiting the taking of a mortgage as a security except for debts previously contracted, i. e. contracted before the mortgage was given. It has no other reasonable or sensible meaning, and this meaning is in harmony with the general object of the section, which was to prevent national banks from having their capital tied up in real estate investments or securities. The
155 usefulness of the banks in aiding the business of the country depends to a great extent upon the mobility of their capital and the readiness with which it can be turned and employed in aid of commerce, and the danger to which, in the view of Congress, the banking system would be exposed by an unlimited power to the banks to loan their funds on real estate securities may have led to the prohibition in question.

The closing paragraph of the section indicates also, perhaps, a mort-

main policy as in the view of Congress, although I apprehend the limit of five years beyond which the banks are prohibited from holding real property as mortgagee in possession or the title to purchase to secure debts due to them was mainly designed as an additional guard against the withdrawal of bank capital from active use and locking it up in real estate.

The suggestion that a bank, by taking a mortgage on lands in this State, is not a holder of the lands mortgaged, and has no estate therein, & is therefore not within the prohibition against holding lands by mortgage to secure future loans, is specious, but not we think sound.

156 The intention of Congress in passing the bank act was to provide for the creation of banking corporations throughout the Union with uniform organizations and powers. It was not intended to allow national banks in any State to take mortgages to secure future loans and to prohibit banks in another State from doing so, depending upon the motive & character of a mortgagee's interest in the lands as defined by the laws of different States. The bank becomes a holder of real estate by taking a mortgage thereon within the true meaning & intendment of the 28th section of the act.

Having reached the conclusion that the National Bank of Genesee was prohibited from taking a mortgage of real estate except to secure a pre-existing indebtedness, the further conclusion seems to follow, that the mortgage from Whitney cannot be enforced. It was not at the time of the sale upon which the surplus moneys were realized a subsisting valid lien upon the land, and as the equity of redemption was not bound by the mortgage, the bank had no claim upon the surplus moneys. It is perfectly well settled in the law that the courts will not enforce

157 a contract the subject of which is either malum prohibitum or malum in se.

A contract made in violation of statute is void, and it is immaterial that it is not so declared in the statute itself.

The law adjudges it to be so, and the courts do not undertake to pass upon the wisdom of the policy of the legislature in enacting prohibitory statutes. Our attention has been called to the case of the Silver Lake Bank vs. North. (4 John. Chan., 370.)

The statute under consideration in that case, as the chancellor construed it, did not prohibit the taking of the mortgage by the bank. There is no room we think in this case to doubt upon the language of the bank act, that it was the intention of Congress to prohibit banks taking a mortgage on lands to secure future advances, and this being so, a security taken for such a purpose is void within numerous authorities. (North River Ins. Co. vs. Lawrence, 3 Wend., 482; Life & Fire Ins. Co. vs. Merchant Ins. Co., 7 Wend., 3; N. Y. Ins. Co. vs. Ely, 2 Con., 178; Bank of Salina vs. Alford, 31 N. Y., 472, and cases cited.)

158 The construction we have given to the 28th section of national bank act is supported by the following cases: Fowler vs. Scully (72, P. A., 456); National Bank of Topeka vs. Rowell (2 Dillon C. Ct. R., 371); Ripley vs. Harris (3 Bis. C. Ct. R., 190.)

The order should be affirmed.

All concur, Rappale J. not voting, Folger J., absent.

Copy:

H. E. SICKELS,
Reporter.

Per C.

(Indorsed:) Crocket against Whitney. Opinion. Andrews J.

159 To the Supreme Court of the United States:

The answer of the justices of the supreme court of the State of New York for the fourth judicial department of said State, to the annexed writ of error.

By the court.

C. A. HULL, *Clerk.*

UNITED STATES OF AMERICA:

The President of the United States of America to the justices of the supreme court of the State of New York for the fourth judicial department of said State, greeting:

Because in the record & proceedings, as also in the rendition of judgment in a suit which is in the said supreme court before you (the record of the final judgment therein pronounced by the court of appeals of the State of New York having been remitted by that court to you for execution), between the National Bank of Genesee, appellant, & Edward M. Whitney, Homer Bostwick, Ebenezer M. McCormick, & John W. Mix, respondents, manifest error hath happened to the great damage of the said National Bank of Genesee as by its complaint appears; & it being fit that the error, if any there hath been, should be duly corrected & full & speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly & openly, you send the record & proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same
160 at Washington, on the second Monday of October next, in the said Supreme Court to be then & there held, that the record & proceedings aforesaid being inspected the said Supreme Court may cause to be further done therein to correct that error, what of right & according to the law & custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 31st day of December, in the year of our Lord one thousand eight hundred & seventy-seven, & of the Independence of the United States the one hundred and second.

[L. S.] CHARLES MASON,
Clerk of the Circuit Court of the United States
for the Northern District of New York.

The foregoing writ allowed this 9th day of January, 1878.

J. MULLEN,
Justice Supreme Court of N. Y.,
Presiding Justice 4th Department.

UNITED STATES OF AMERICA, *ss:*

To Edward M. Whitney, Homer Bostwick, Ebenezer M. McCormick, & John W. Mix, greeting:

You are hereby cited & admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, in the county
161 of Genesee, in the fourth judicial department of said State, wherein the National Bank of Genesee is plaintiff, & you are defendants

in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected & speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 9th day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

J. MULLEN,
Justice Supreme Court N. Y., Presiding Justice 4th Department.

Court of appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals held at the capitol, in the city of Albany, on the 13th day of November, in the year of our Lord one thousand eight hundred & seventy-seven, before the judges of said court.

Witness the Hon. Sanford E. Church, chief judge presiding.

E. O. PERRIN, *Clerk.*

Remittitur Nov. 14, 1877.

162 MARIA CROCKER
vs.
EDWARD M. WHITNEY, THE NATIONAL BANK of Genesee, & others.

Be it remembered that on the 30th day of March, in the year of our Lord one thousand eight hundred & seventy-seven, The National Bank of Genesee, the appellant in this action, came here into the court of appeals, by William C. Watson, its attorney, & filed in the said court a notice of appeal & return thereto from the order of the general term of the supreme court of the State of New York, and Homer Bostwick & others, the respondents in said action, afterwards appeared in said court of appeals, by M. H. Peck & Taggart & Day, their attorneys, which said notice of appeal & the return thereto filed as aforesaid are hereunto annexed. Whereupon the said court of appeals, this cause having been submitted for the appellant, and having heard Mr. M. H. Peck, of counsel for the respondents, & after due deliberation had thereon, did order & adjudge that the order of the general term of the supreme court appealed from in this action be & the same is hereby affirmed with costs. And it is also further ordered that the record aforesaid & the proceedings in this court be remitted to the said supreme court there to be proceeded upon according to law.

Therefore it is considered that the said order be affirmed with costs as aforesaid, and hereupon as well as the notice of appeal & return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justice thereof, according to the form of the statute in such case made & provided, to be enforced according to law, and which record now remains in the
163 said supreme court before the justices thereof, &c.

F. S. PERRIN.
D'p Clerk of the Court of Appeals of the State of New York.

Court of appeals.

CLERK'S OFFICE,
Albany, Nov. 14, 1877.

I hereby certify that the preceding record contains a correct trans-

cript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

[L. S.] F. S. PERRIN,
D'p. Clerk.

GENESEE COUNTY, *ss:*

To the judges of the court of Appeals:

The answer of the justices of the supreme court to the within appeal.

By the court.

C. A. HULL, *Clerk.*

Supreme court Genesee County.

MARIA CROCKER
ag't
EDWARD M. WHITNEY, THE NATIONAL BANK of Genesee of Batavia, Ebenezer M. McCormick, Homer Bostwick, & others.

Take notice that the National Bank of Genesee, above named, one of the claimants to the surplus moneys in this action, appeals to the court of appeals from the order herein, & the whole thereof, of the gen-
164 eral term of the supreme court, fourth judicial department, which said general term was held at the city of Rochester, Monroe County, on the 13th day of October, 1876, which said order was entered in Genesee County clerk's office on the 23d day of October, 1876, & affirms the order of the special term, which was entered in Genesee County clerk's office on the 6th day of March, 1876.

Dated November 24, 1876.

Yours, &c.,

WILLIAM C. WATSON,
Attorney for the National Bank of Genesee.

To CARLOS A. HULL,
County Clerk of Genesee County.
M. H. PECK, Esq.,
Attorney for Homer Bostwick.
TAGGART & DAY, Esqs.,
Attorneys for Ebenezer M. McCormick.

Filed Nov. 24, 1876.

(Indorsement on cover:) No. 429. The National Bank of Genesee, pl'ff in error, vs. Edward M. Whitney et al. New York sup. ct. Filed 11th June, 1878.

REC. 429—6

JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

THE NATIONAL BANK OF GENESEE *vs.* EDWARD M. WHITNEY AND OTHERS.	*In Error to the Supreme Court of New York.*

Brief for Plaintiff In Error.

The original suit, out of which this controversy arose, was brought in the Supreme Court by Maria Crocker, to foreclose a mortgage given her by Edward M. Whitney. A sale was had in pursuance of the judgment in that suit, and a surplus of $3,889.80 was paid to the County Treasurer, as officer of the Court. (*Record, p. 6*).

Conflicting claims to the surplus were filed by subsequent encumbrancers; among them, one by the plaintiff in error, to an amount greater than the entire surplus, founded upon a mortgage given it by Whitney (*Record, p. 7*). There were two successive references to report upon these claims, the first report being set aside upon exceptions (*pp. 1–6, 34*). Upon the second reference, the claim of the plaintiff in error was wholly disallowed, and the surplus money was ordered to be paid to junior encumbrancers (*pp. 35–39*). This report, except in certain minor particulars having no relation to the present controversy, was sustained by the Court at Special Term (*Exceptions by Bank, pp. 51–53; Order, pp. 55–56*).

The same Court, "at General Term," or in full bench, affirmed this order upon an appeal by the Bank (*pp. 59–60*). The Bank again appealed (*p. 63*) to the Court of Appeals, which affirmed the order appealed from, and remitted the record and the judgment into the Supreme Court, to be enforced (*p. 68*). In that Court the "order and determination of the said Court of Appeals" were "made the order and decision of the Supreme Court," and the respondents were awarded their costs of the appeal (*pp. 60–61*). Thereupon the Bank sued out this writ of error (*p. 67*).

The mortgage to the plaintiff in error was dated January 12, 1871, and recorded September 19, 1872. By its terms, it was intended as security for the payment of $5,000, one year from date, with interest; and was declared to be executed as collateral security to the Bank "for the payment of all notes which it may hold against the" mortgagor, "or for any other indebtedness now due or may hereafter become due" (*p. 16*). At that time Whitney was indebted to the Bank in the sum of $3,200; but no new loan, discount or advance was made to him by the Bank, concurrently with the mortgage (*p. 35*). This $3,200 was paid before September 16, 1872, when he executed the two mortgages under which the defendants in error, Bostwick and McCormick, were declared to be entitled to the surplus (*pp. 36, 38*).

At the time of the foreclosure, in 1874, Whitney was indebted to the Bank in the sum of $5,160.10, represented by a single note, made up of renewals of former liabilities which reached back to May, 1872. This note the referee held to be void, for usury (*pp. 36, 38*); but the Court upon exceptions, while holding it "not necessary to pass upon the question whether the note" was void or not, intimated its opinion that the negative of that question was settled in *F. & M. Nat. Bank vs. Deering, 91 U. S. 29* (*p. 57*). While of the opinion, therefore, that the note was valid, it held, with the referee, that the mortgage was void, because the National Banking Act authorized institutions organized under its provisions to take mortgages only to secure debts actually due them at the time, and not to secure future indebtedness (*p. 57*). This opinion was adopted by the Court at General

Term (*p. 60*). The Court of Appeals took the same view, as appears not only by its opinion, of which a copy is made part of the record here (*pp. 62–66*), and which is reported (*sub tit. Crocker vs. Whitney*) in *71 N. Y. 161*, but also by the certificate of its Chief Judge (*Record, p. 61*).

At the last term of this Court the defendant moved to dismiss the writ of error. The motion having been, upon a voluminous argument in support of it, denied, it is understood that all questions of jurisdiction are eliminated from the present controversy.

ASSIGNMENTS OF ERROR.

The eleven exceptions (*Record, pp. 51-53*) of the plaintiff in error to the referee's report were all overruled (*p. 56*). But the errors now insisted upon, although complained of in several varying forms by the exceptions, are in effect reduced to two:

1. That it was decided that the note of $5,160.10, discounted by the Bank, was void for usury.

2. That it was decided that the mortgage held by the Bank as security for this or any indebtedness from Whitney, was not a valid security for Whitney's note.

POINTS.

I.

The referee erred in holding that the Whitney note was void for usury.

It is true that the Court at Special Term expressed a doubt whatever this finding was sound (*p. 57*); that the Court at General Term concurred in this expression (*p. 60*); and that the Court of Appeals did not advert to this question, deeming it unnecessary to pass upon it in view of its disposition of the case upon another point (*pp. 62–66*). But it was none the less an error in the referee, our exception to which was overruled (*p. 56*); and it is proper that this Court should so adjudge, for the guidance of the Court below.

The question has been so distinctly ruled in this Court that it can only be necessary now to refer to that decision, without further argument.

Farmers' & Mechanics' Nat. Bank vs. Deering, 91 U. S. 29.

II.

The referee erred in holding that the plaintiff in error "has no claims or liens upon the surplus moneys in this action," and that such moneys must be paid to claimants whose liens upon the mortgaged land were junior and subordinate to this lien of the plaintiff's mortgage (*pp.* 38–39).

Upon this question, too, there is no longer room for argument in this Court. Since the action of the Court of Appeals which is now reviewed, this tribunal has determined that the prohibition of the taking of mortgages by National Banks as security for future advances cannot be successfully objected by the mortgagor when the Bank seeks to enforce its security.

National Bank vs. Matthews, 93, U. S. 621.

See also

Whitney vs. Wyman, 101 Id. 397.
Jones vs. Guaranty and Indemnity Co., Id. 628.

III.

The judgment and order of the Supreme Court of New York should therefore be reversed, with costs; and the cause remanded to that Court, with the direction to allow the claim of the plaintiff in error to all the surplus moneys in the hands of the Treasurer of Genesee County.

THEODORE BACON,
Attorney and Counsel for Plaintiff in Error,
Rochester, N. Y.

OFFICE SUPREME COURT U.S.
FILED
DEC 17 1880
JAMES H. McKENNEY, CLK.

UNITED STATES

Supreme Court.

THE NATIONAL BANK OF GENESEE,
Plaintiff in Error,

AGAINST

EDWARD M. WHITNEY AND OTHERS, HOMER BOSTWICK AND EBENEZER M. McCORMICK,
Who are Defendants in Error.

Brief and Argument.

THEODORE BACON, Esq.
Attorney for Plaintiff in Error.

W. HARRIS DAY,
Attorney for Defendants in Error.

PRINTED AT THE GAZETTE OFFICE,
LE ROY, N. Y., 1880.

U. S. Supreme Court.

FIRST NATIONAL BANK OF GENESEE,
Plaintiff in Error,
VERSUS
EDWARD M. WHITNEY and others, and HOMER BOSTWICK and EBENEZER M. McCORMICK,
Who are Defendants in Error.

1

Statement of facts, findings and other proceedings deemed material in this case.

FIRST.

Maria Crocker foreclosed a mortgage executed by Edward M. Whitney, upon certain real estate situated in 2
the County of Genesee in the State of New York, by action in the Supreme Court of said State in which action the above named plaintiff in error, and defendants in error, were made parties defendants as subsequent incumbrances of the property covered by said mortgage. Judgment of foreclosure and sale of the mortgaged premises was recovered in said action, and the mortgaged premises were sold on the 25th day of July, 1875, and bid

off by the above named plaintiff in error, for a sum sufficient to satisfy the amount of said mortgage, interest
3 and cost, and the sum of $3,889.80 surplus money.

Record, page 1, folio 2, and page 6, folio 14.

SECOND.

Ebenezer M. McCormick above named, claimed such surplus moneys or some part thereof, by virtue of a lien or incumbrance thereon under a junior mortgage given by defendant Whitney to him upon the mortgaged premises, and made application to said Supreme Court for an order of reference to ascertain and report the amount due to him, or to any other person which is a lien upon such surplus money, &c.

4 Whereupon it was ordered by said Supreme Court at a special term thereof that it be referred to W. W. Rowley of Buffalo, N. Y., Counsellor at Law, as Referee to ascertain and report the amount due to said Ebenezer M. McCormick or to any other person which is a lien upon such surplus moneys, and as to the priority of the several liens thereon.

Record, page 6, folios 14 and 15.

THIRD.

On the 12th day of January, 1871, said Edward M. Whitney, the owner of the mortgaged premises so sold,
5 made, executed and delivered a mortgage thereon to the National Bank of Genesee, bearing date on that day, conditional, and intended as security for the payment of five thousand dollars in one year from its date, to be held by the Bank as collateral security for the payment of all notes at that time held by said Bank against said Whitney, and for other indebtedness then due or thereafter to become due. Such mortgage was recorded in Liber 71 of mortgages at page 372 on the 19th day of

September, 1872, in the office of the County Clerk of the county of Genesee.

Record, page 7, folio 17. 6

FOURTH.

Homer Bostwick held a mortgage on said premises given by said Whitney to said Bostwick, dated September 16th, 1872, recorded same day at 12 o'clock M., in liber 71 of mortgages at page 369, in the Genesee county clerk's office, conditioned as follows: "As security for the payment of any and all liabilities and indebtedness that had already been or might hereafter be incurred by said Homer Bostwick for and on account of said Whitney, either by indorsement or otherwise, to an amount not exceeding $2,500." 7

Record, page 6, folio 16.

FIFTH.

Ebenezer McCormick held a mortgage, given by said Whitney to him, upon said premises, bearing date September 16th, 1872, recorded September 16th, 1872, at 1 3-4 o'clock p. m., in liber 71 of mortgages at page 370 in Genesee county clerk's office, conditioned as follows: "For the security for payment of any and all liabilities and indebtedness that has already been or may hereafter be incurred by the said McCormick for and on account of said Edward M. Whitney, either by indorsement or otherwise, to an amount not exceeding $1,500." 8

Record, page 6, folios 14 and 15.

SIXTH.

At the time of receiving the mortgage from said Whitney McCormick had no knowledge of either the said mortgage to the National Bank or to said Bostwick except what was afforded by the record in the Genesee county clerk's office.

Referee's Report at page 38, folio 90 of Record, and McCormick's testimony, page 10, folio 23 and page 11,
9 folio 26 of Record.

SEVENTH.

At the time of the execution and delivery of said mortgage to said National Bank of Genesee the said Whitney was imdebted to the said bank in the sum of $3,200, the whole of which sum was paid by said Whitney to the bank before the execution and delivery of the mortgage to said Bostwick, or said McCormick, or either of them.

Record, page 16, folio 38; page 15, folio 30; page 19, folio 44; page 20, folios 46 and 47; page 38, folio 90,
10 and becomes a part found by Referee.

EIGHTH.

The said Referee made his report in pursuance of such order bearing date October 6, 1874, as to matters of fact as set forth in Record, pages 1 to 6.

From the facts so found, the said Referee also made his report as to conclusions of law, as found in said Record, page 5.

The above mentioned findings of fact and law, are substantially repeated in said Referee's second report. It is not deemed necessary to state in this place, either the
11 findings of law or fact, or any evidence or other matters pertaining to the first hearing, but simply to refer to the case as to all such matters.

NINTH.

The said National Bank of Genesee excepted to such report, as will appear by reference to Record, page 27 folios 62 to 65.

Edward M. Whitney, Joshua Lathrop and John P. P.

Lathrop also excepted to such report, as will appear by reference to Record page 28, folios 65 to 69.

John W. Mix also excepted to said report, as will appear by reference to Record, from page 69 to 72. 12

TENTH.

On hearing such report and exceptions at a special term of the Supreme Court held on the second Tuesday of November, 1874, it was ordered that the exceptions taken by the National Bank of Genesee be sustained, and the exceptions taken by the other claimants be overruled.

Record, page 31, folios 72 to 78.

It was further ordered that it be referred back to W. W. Rowley, Esq., the same Referee, to be heard *de novo* upon the same evidence, and to take further proof if any 13 is offered by the parties, and to report as to their rights herein, and that all of the parties have the right to attend the hearing, and give further evidence. That any party may file new exceptions upon the filing of the report.

Record, page 33, folios 78 and 79.

ELEVENTH.

The said Referee made his second report to the said Supreme Court on the 22d of October, 1875, in which he reports the following facts :

1st. The said National Bank of Genesee was char- 14 tered in the month of May, 1865, under and in pursuance of the National Banking Act passed in 1864.

2d. On the 12th of January. 1871, Edward M. Whitney, the owner and mortgagor of the premises sold in said action, made, executed and delivered a mortgage dated on that day to the National Bank of Genesee, conditioned and intended as security for the payment of five thousand dollars, one year from its date, to be held

by said Bank as collateral security for the payment of
15 all notes at that time held by said Bank against Whitney, and for any other indebtedness of said Whitney then due, or thereafter to become due. That such mortgage was duly recorded on the 19th day of September, 1872, in liber 71 of mortgages, at page 372.

3d. At the time said mortgage was given, Whitney was actually indebted to the said Bank in the sum of $3,200 and no more.

4th At the time such mortgage was given to the Bank, and concurrently therewith, there was no money loaned, or discounts made, nor any advancements whatever, made on the part of such Bank to said Whitney.

16 5th. After such mortgage was given, said Whitney continued to do business with the Bank, of which the Bank kept but one account, in which the indebtedness of $3,200 secured by the mortgage was entered.

6th. Such account of Whitney with the Bank amounted to a large sum; one branch of which, to wit: the discount of notes and drafts between the 16th day of January, 1871, and the 28th day of August, 1874, inclusive, amounted to $171,175 52. Another branch of which account, to wit: payments made by Whitney to the Bank during the same period, amounted to $168,-237.61. That these two items constitute only a part of
17 his general account with the Bank.

7th Such debits and credits were made in his general open account before mentioned. Said Whitney was indebted to said National Bank on the 18th day of June 1874, in the sum of $5,160.10, and that no part thereof had been paid. Such indebtedness of said Whitney to the Bank is made up by renewals of former liabilities, some part of which had existed since May 1872, and all of it with the exception of interest, since September 1872.

8th. The said Bank holds no security for the said in-

debtedness, other than the mortgage above mentioned.

Case, folios 243 to 246, inclusive.

9th. The said Bank purchased the premises so mortgaged to it by Whitney, upon the sale thereof upon which the surplus money arose, and has received a conveyance thereof. 18

Case, folio 247.

10th. All of said notes made by Whitney and held by the Bank on the 30th of September, 1872, have been kept alive by renewals, and are included in and represented by said note of $5,160.10.

Case, folio 248.

11th. Homer Bostwick holds a mortgage given by said Whitney to him, bearing date September 16th, 1872, recorded same day at 12 M., in liber 71 of mortgages, page 369, in Genesee county clerk's office, conditioned as follows: "As security for the payment of any and all liabilities and indebtedness by Bostwick for and on account of said Whitney either by indorsement or otherwise, to an amount not exceeding $2,500." 19

Case, folios 249 and 280.

12th. At the time said mortgage was given the said Bank held two notes made by Whitney and indorsed by Bostwick, one for $700, the other for $600. Such notes have not been paid, but have been renewed from time to time, and were represented by the two notes given in evidence, dated June 2d, 1874, one for $740, the other for $635. 20

Case, folios 250 and 251.

13th. At the same time, the First National Bank of Batavia held two other notes made by Whitney and indorsed by Bostwick, one for $500, the other for $700. Those notes have not been paid, but have been renewed from time to time, and are represented by the note given in evidence, indorsed by Bostwick for $1,228.97.

Case, folios 151 and 152.

14th. Ebenezer M. McCormick holds a mortgage given by Whitney to him, dated September 16th, 1872,
21 recorded same day at 1 3-4 o'clock p. m., in liber 71 of mortgages at page 370, in Genesee county clerk's office, conditioned as follows: "For the security for the payment of any and all liabilities and indebtedness that has already or hereafter may be incurred by the said McCormick for and on account of said Edward M. Whitney either by indorsement or otherwise, to an amount not exceeding $1,500."

Case, folios 254 and 255.

15th. At the time such mortgage was given McCormick was liable as indorser upon two notes made by Whitney, one for $500 payable at Flour City Bank of Rochester,
22 the other for $1,000, payable at First National Bank of Batavia. The $500 note was paid by proceeds of $530 note payable at First National Bank of Batavia, of which $100 was paid, and the balance, viz.: $430, has been renewed from time to time, and is now represented by the note for that amount introduced in evidence, dated May 24th, 1874. The $1,000 note has not been paid, but has been renewed from time to time, and with some accumulations is represented by the note produced in evidence, for $1,034 30, made by Whitney and indorsed by him That these two notes are held by the First National Bank of Batavia, and are past due and
23 remain unpaid

Record, page 37, folio 88.

16th. Said Edward M. Whitney is insolvent.

Record, page 38, folio 89.

17th. Said Bostwick, at the time of receiving said mortgage from Whitney to him, had knowledge of the mortgage at that time existing, held by the said National Bank of Genesee.

Record, page 38, folio 89.

18th. McCormick, at the time of receiving said mortgage from Whitney to him, had no knowledge of either said mortgage to the said National Bank of Genesee, or to said Bostwick, except what was afforded by the record in the Genesee county clerk's office.

Record, page 38, folio 90.

19th. The indebtedness of said Whitney to the Bank, amounting to $3,200, existing at the time the mortgage was given by Whitney to the Bank, was paid before the execution by Whitney of either of the subsequent mortgages.

Record, page 38, folio 90.

20th. All of the discounts and renewals made for Whitney by said Bank, after his giving the said mortgage, were made upon his individual notes without any indorsement or security.

Record, page 38, folio 90

TWELFTH.

The said Referee also, in his said report, found and reported as matters of law, as follows:

Record, page 38, folio 90.

1st. The said National Bank of Genesee has no claim or lien upon the surplus money in said action. That the note introduced by the claimant, the National Bank of Genesee, is void.

Record, page 38, folio 90.

2d. The mortgage held by Bostwick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $2,500.

Record, page 38, folio 91.

3d. The mortgage held by McCormick is a good and valid security for any liability incurred by him as indorser for Whitney to any amount not exceeding $1,500.

Record, page 38, folio 91.

4th. The three notes introduced by Bostwick, one for

$740, and one for $635, each dated June 2d, 1874, and the other for $1,228.97, dated May 28th, 1874, are void.

Record, page 38, folio 91.

27 5th. The note introduced by McCormick for $1,034.30, dated May 28th, 1874, is void. The note introduced by said McCormick for $430, dated May 28th, 1874, is a good and valid note.

Record, page 38, folio 91.

6th. The said Bostwick took his mortgage subject to the National Bank mortgage, and gained nothing by having it recorded as against that mortgage.

Record, page 38, folio 91.

7th. McCormick takes precedence to the National Bank mortgage, but is subseqent to the Bostwick mortgage.

28 Record, page 38, folio 92.

8th. The Bostwick mortgage is the *first* lien. The McCormick mortgage is *second*. The National Bank mortgage *third*.

Record, page 38, folio 92.

9th. Bostwick, under and by virtue of the mortgage executed by said Whitney to him, is entitled to $2,500 of such surplus money, and is the first lien thereon.

Record, page 39, folio 92.

10th. McCormick, under and by virtue of the mortgage executed by said Whitney to him, is entitled to $1,500 of such surplus money, and is the second lien

29 thereon.

Record, page 39, folio 92.

11th. The surplus moneys to be paid to the claimants before named, so far as the same are sufficient.

Record, page 39, folio 93.

THIRTEENTH.

The National Bank of Genesee excepted to said report as follows :

Record, page 51, folio 114, e.

1st Exception. To the finding that said bank has no claim or lien upon the surplus moneys in said action.

Record, page 51. folio 114.

2d Exception. To the finding that the $5,160.10 note is void.

Record, page 51, folio 115.

3d Exception. To the finding that the two notes introduced by claimant Bostwick, one for $740, and one $635, dated June 2d, 1874, are void.

Record, page 51, folio 115.

4th Exception. To the finding that McCormick's mortgage takes precedence to the National Bank mortgage.

Record, page 51, folio 115.

5th Exception. To the finding as to the priority that the Bostwick mortgage is first, the McCormick mortgage second and the Bank mortgage third.

Record, page 51, folio 116

6th Exception. To the finding that Bostwick is entitled to $2,500 and has the first lien. That McCormick is entitled to the second lien on such surplus money, or to $1,500 thereof, Mix to $1,234.83 thereof, and has the third lien therein, and Joshua and John P. P. Lathrop are entitled to $1,586.75 of such surplus moneys, and have the fourth lien, and that the surplus moneys be paid to the said claimants so far as sufficient.

Record, page 52, folio 116.

7th Exception. To the finding that the $5,160.10 note is made up of renewals of former liabilities, some part of which have existed since May, 1872, &c.

Record, page 52, folio 117.

8th Exception. To the finding that the Bank holds no security for said indebtedness of $5,160,10 other than the mortgage, &c.

Record, page 52, folio 117.

9th Exception. To the finding that McCormick, at

time of receiving mortgage from Whitney, had no knowledge of mortgage to the National Bank of Genesee.

33 Record, page 52, folio 118.

10th Exception. To the finding that the indebtedness of Whitney to the amount of $3,200 existing at the time mortgage was given to the Bank was paid before the execution of either of the subsequent mortgages.

Record, page 53, folio 118.

11th Exception. To the finding that all the debts and credits of Whitney in his dealings with the Bank were made and kept by said Bank in said Whitney's general account, &c.

Record, page 53, folio 118.

FOURTEENTH.

34 Edward M. Whitney, Joshua and John P. P. Lathrop except to the report of said Referee.

Record, page 53, folio 119.

But as they are not parties to the writ of error herein, and have no interest in the case, it is not necessary to cite or refer to such exceptions.

FIFTEENTH.

Ebenezer McCormick excepts to said report as follows, viz.:

1st Exception. To the finding of said Referee that the note introduced by McCormick for $1,034,30, dated May 28th, 1874, is void. Also to the finding that the
35 First National Bank did exact and receive from Whitney upon discounting the note of $1,000 held at the time said mortgage was given a greater rate of interest than seven per cent per annum.

Record, page 55, folio 124.

SIXTEENTH.

Homer Bostwick excepted to said report.

1st Exception. To the finding that the three notes,

one of $740, one of $635, each dated June 2d, 1874, held by the National Bank of Genesee, and one of $1,-228.97, held by the First National Bank were, and each of them is void. 36

Record, page 55, folio 126.

SEVENTEENTH.

The exceptions were brought to a hearing at a special term of the Supreme Court held at Rochester on the third day of March, 1876, whereupon it was ordered:

1st. That the exceptions filed by the claimant, the National Bank of Genesee, to the said report be, and the same were disallowed and over-ruled.

2d. That the exceptions filed by the claimant McCormick, to the said report, be, and the same were allowed 37

3d. That the exceptions filed by the claimant Bostwick be, and the same were allowed.

4th. That the exceptions filed by the defendants Whitney and Lathrop be, and the same were disallowed and over-ruled.

5th. That said Referee's report be amended by striking out the findings that the four notes herein before mentioned were void.

6th. That said report, as so amended, be in all things confirmed.

7th. That the costs and charges of the Referee be first paid out of such surplus funds, and the residue thereof be applied to pay the said $2,500 to which Bostwick is entitled, as found by the Referee, after which the claimant McCormick is to be paid the sum of $1,500, to which he is entitled, as found by the Referee, or so much as the remainder of the surplus money will pay. 38

Record, pages 55 and 56, folios 126 to 129.

EIGHTEENTH.

The National Bank of Genesee appealed from said

order made at special term to the general term of the Supreme Court.

Record, page 59, folio 134.

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NINETEENTH.

At a General Term of the Supreme Court, Fourth Department, held on the 13th day of October, 1876, the said General Term affirmed said order of the Special Term with $10 00 costs and disbursements on opinion of said Special Term.

Record, page 59, folio 137.

TWENTIETH.

The National Bank of Genesee, on the 28th day of November, 1876, appealed to the Court of Appeals,
40 from the said order of the General Term.

Record, page 69, folio 163.

TWENTY-FIRST.

The said appeal having been brought to a hearing before said Court of Appeals, the notice of appeal and the return thereto having been filed, the cause in said Court of Appeals having been submitted for the Appellant and having heard Mr. Peck of counsel for Respondent, the said Court, after due deliberation had thereon, did order and adjudge that the said order of the General Term of the Supreme Court appealed from in said action, be and
41 the same was thereby affirmed with costs. And it was further ordered that the record and proceedings in said Court of Appeals be remitted to the said Supreme Court there to be proceeded upon according to law.

It was thereupon considered that said order be affirmed with costs as aforesaid. The said record, costs and proceedings were thereupon remitted to the said Supreme Court.

Record, page 60, folio 139.

TWENTY-SECOND.

At a Special Term of the Supreme Court held at the Court House in the village of Batavia, in the county of 42
Genesee, on the 26th day of November, 1877, it was, on reading and filing the remitter from the Court of Appeals, ordered that the order and determination of the said Court of Appeals, affirming with costs the order of the General Term of the Supreme Court appealed from, be and the same be made the order and decision of the Supreme Court.

Record, page 60, folio 138.

TWENTY-THIRD.

The said National Bank of Genesee, on or about the twenty-third day of January, 1878, obtained and caused 43
to be issued a writ of error to remove said order and decision of the Court of Appeals to the Supreme Court of the United States, returnable on the second Monday in October, 1878.

Record, page 67, folio 159.

That the Hon. Sanford E. Church, previous to the issuing of such writ of error made and signed a certificate in the words and figures following, that is to say :

STATE OF NEW YORK—In Court of Appeals.

MARIA CROCKER
VERSUS
EDWARD M. WHITNEY. 44

I hereby certify that in the proceedings on the appeal before this Court in the action above entitled, it was claimed on the part of the appellant, the National Bank of Genesee, that under and by virtue of the Act of Congress entitled "An act to provide for a National Currency, secured by a pledge of United States Bonds, and

to provide for the circulation and redemption thereof," approved June 3d, 1864. (Ch. 166.)

45 The said Bank possessed the right and privilege of taking and holding mortgages of real estate, given to such Bank as security for future loans to be made by such Bank to the mortagors, or future indebtedness to be incurred by said mortgagors to said Bank, and that the mortgage of the defendant Whitney to the Bank mentioned in the record, was valid, notwithstanding all the indebtedness of Whitney to the Bank at the time when the mortgage was given, had been paid by Whitney, and that the said Bank was entitled to the fund in question, as having the first lien thereon to the full amount thereof. That on the part of the Respondent in said appeal it was claimed that the Appellant had no
46 such right or privilege under the said Act of Congress, and that said mortgage was therefore void.

That this Court sustained the position of the Respondents, and held that the Appellants had no such right or privilege under said Act of Congress as it claimed, and that the mortgage of Whitney to the Appellant was therefore void, and on that ground alone, affirmed the order of the Supreme Court appealed from, denying any claim of the Appellant to the fund in question or any part of it, and directing its payment to the Respondents in the order of the date of their liens.

Dated January 21st, 1878.

47 SANFORD E. CHURCH,
Ch J. Court of Appeals.

Record, page 61, folio 141.

Brief and Argument

FOR DEFENDANTS IN ERROR.

FIRST POINT.

This cause was removed to this court by writ of error to the Supreme Court of the State of New York.

See Record, page 67.

48

There is no assignment of errors and no prayer for reversal and no citation annexed to and returned with the writ of error, as required by law.

Section 997 of the Revised Statutes is as follows:—"There shall be annexed to and returned with any writ "of error for the removal of a cause, at the day and place "therein mentioned, an authenticated transcript of the "record, an assignment of errors and a prayer for reversal "with a citation to the adverse party."

Here is no assignment of errors, no prayer for reversal and no citation.

This practice is expressly made to apply to such cases as this.

49

Section 1,003 of the Revised Statutes is as follows:—"Writs of error from the Supreme Court to a State "court, in cases authorized by law, shall be issued in the "same manner and under the same regulations, and shall "have the same effect, as if the judgment or decree com-"plained of had been rendered or passed in a court of "the United States."

With no assignment of errors in the case there is noth-

ing upon which the cause can be heard and the judgment of the State Court should be affirmed.

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SECOND POINT.

The mortgage to the National Bank of Genesee is void, because prohibited by statute.

1. The powers of National Banks are defined in Section 5,136 of the Revised Statutes. The seventh power thus enumerated is as follows:— * * * * "Sev- "enth. To exercise * * * all such incidental powers "as shall be necessary to carry on the business of banking; " * * * * by loaning money as personal security."

Personal security means the security of the personal responsibility of individuals or security by the mortgage
51 or pledge of personal property as distinguished from real property.

The specification of the power to loan money on "personal security" is a prohibition against loaning money upon the security of real estate.

The People vs. Utica Ins. Co., 15 John., 383.

In this case Chief Justice Thompson says, speaking of an insurance corporation :—"The specification of certain "powers operates as a restraint to such objects only, and "is an implied prohibition of the exercise of other and "distinct powers."

In the case of New York Firemen's Insurance Com-
52 pany vs. Ely, (2 Cowen's Rep., 700) Judge Sutherland said :—"The making of loans upon promissory notes "might thus perhaps have been justifiable if it was not "prohibited by the restraining act." But in this case the 16th section of "the act expressly provides that it shall "be lawful for the corporation to invest their capital or "any portion of it, either in the stock of the United "States or of the individual States : thus by the strong- "est implication, prohibiting any other mode of invest- "ment and destroying the inference which might have

"resulted from the absence of all regulations upon the "subject."

The maxim applies here, *Expresio unius personae,* 53
vel rei exclusio alterius—an express power having been granted to National Banks to loan money "on personal security" that excludes the loaning of money on any other security. Loaning money on mortgage security is not loaning it on "personal security."

The statute therefore prohibits the loaning of money on real estate or mortgage security.

The plaintiff in error, when it took the mortgage for future loans, did so in violation of law.

2. Section 5,137 of the Revised Statutes prohibits the taking of a mortgage by National Banks, except to 54
secure debts previously contracted. The language of that section is: "A National Banking Association may "purchase, hold and convey real estate for the following "purposes, and for no others." * * * "Second— "Such as shall be mortgaged to it in good faith by way "of security for debts previously contracted."

These two sections doubly prohibit loans on real estate, and the prohibition, although implied, is as clear and effectual as if it were expressed.

See opinion of the New York Court of Appeals in the Record and 71 N. Y. Reps., 161.

Fowler vs. Scully, 72 Pa., 456.

National Bank of Topeka vs. Rowill, 2 Dillon (C. Ct. 55
R.) 371.

Ripley vs. Harris, 3 Bis., (C. Ct. R.) 199.

It remains to be seen whether National Banks can be a law unto themselves and defy the acts of Congress with impunity; whether they can come into court and use the courts to enforce executory contracts which they have made in willful and flagrant violation of the laws of the country; whether the only remedy is interference by the

State to annul the franchise, a remedy practically of no use whatever.

56 It is found as a fact by the State court and can not be disputed here, that the mortgage in question is not to secure any debt contracted previous to its execution. That all debts of the mortgagor which existed at the date of the mortgage have been paid and the mortgage is sought to be upheld only as a security for loans made after its execution and upon it as a security.

Record, page 38.

THIRD POINT.

The mortgage to the plaintiffs in error being in violation of law, cannot be enforced in the courts, and is void.

57 "It is a settled principle," says the New York Court of Appeals, "that the courts will not enforce a contract "which is either *malum prohibitum* or *malum in se*. A "contract made in violation of a statute is void, and it "is immaterial that it is not so declared in the statute "itself." *Ex turpi contractu actio non oritur.*

The cases in support of this proposition are legion, the following are a few of them :

Bank of Salina vs Alvord, 31 N. Y., 473.
North River Ins. Co. vs. Lawrence, 3 Wend., 482.
New York Ins. Co vs. Ely, 2 Cowen, 678.
Life & Fire Ins. Co. vs. Merch. F. Ins Co., 7 Wend 31.
Bank of the United States vs. Owens, 2 Peters., 527.
58 Bank ——— vs. Lanier, 11 Wallace, 369.
Bank of Augusta vs. Earle, 13 Peters., 587.
Seneca County Bank vs Lamb, 26 Barb, 595.
Story on Contracts, Section 613.
Bowton vs. Port Jackson Plank Road Co., 17 Barb. 397
Griffith vs. Welles, 3 Denio, 226.
Mitchell vs. Smith, 1 Binney, 110.
Biddis vs. James, 6 Binney, 329.
Maybin vs. Conlin, 4 Dallas, 298.

Duncanson vs. McClure, 4 Dallas, 308.
Badgeley vs. Beale, 3 Watts, 263.
Kepner, vs. Keefer, 6 Watts, 231.
Wagonseller vs. Snyder, 7 Watts, 343.
Clippinger vs. Hepbaugh, 5 W. & S., 315.
Filson vs. Hines, 5 Barr., 452. [S., 233.
Columbia Bank & Bridge Co. vs. Haldeman, 7 W. &
App vs. Coryell, 3 Penna. Rep., 494.
Edgell vs. McLaughlin, 6 Wharton, 176,
Brua's Appeal, 5 P. F. Smith, 295.
Pennington vs. Townsend, 7 Wen. 276.
Swan vs. Scott, 11 S. & R., 164.
Thomas vs. Brady, 10 Barr., 170.
Scott vs. Duffy, 2 Harris, 20.
Evans vs. Dravo, 12 Harris 65.
Nellis vs. Clark, 4 Hill's, 424.
Gray vs. Hook, 4 N. Y. Rep., 449.
Bell vs. Leggett, 7 N. Y. Rep., 173.
1 Com. on Contracts, 30.
1 Story Eq., 296.
Peck vs. Burr, 10 N. Y. Rep., 294.
Rose vs. Truas, 21 Barb., 361.
Nellis vs. Clark, 20 Wendell, 24.
Moseley vs. Moseley, 15 N. Y, 334.
Hooker vs. Vandewater, 4 Denio, 349.
Beman vs. Tugnot, 5 Sandford, 153.
Pepper vs. Haight, 20 Barb., 429.

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Here the Bank is the moving party. It cannot establish its case without the aid of the illegal transaction. It shows at the outset that it has broken the law, and it asks the court to enforce an illegal contract. The law will not allow this to be done.

The case of the Union National Bank of St. Louis vs. Matthews (8 Otto, 621) is distinguished from this :—

1. In that case the trust deed was executed to individuals and not to the bank, and the note which it was
62 given to secure was a valid note in its inception, the security therefore had an existence before the bank got it. The trust deed followed the note as an incident.

In this case the mortgage is made directly to the bank, and in violation of positive law—the mortgage therefore never had a legal existence. It was a nullity to begin with. To show how flagrantly this bank violated the law, it should be noticed that this was a second mortgage at the time it was executed, and became a fourth mortgage before it was recorded.

In that case the court refused to cancel the contract which the statute does not declare to be void and which was not prohibited. In this case the court is asked to
63 hold the contract to be a nullity because it is prohibited by law.

2. In that case the court, in its opinion, quotes approvingly the following language from the opinion of the Supreme Court of Iowa, in The First National Bank of Fort Dodge vs. Haire and others, 36 Iowa, 443:

"Every loan or discount by a bank is made in good "faith, in reliance, by way of security, upon the real "or personal property of the obligors; and unless the title "by mortgage or conveyance is taken to the bank direct-"ly for its use the case is not within the prohibition of
64 "the statute. The fact that the title or security may "inure indirectly to the security and benefit of the bank "will not vitiate the transaction."

This is as far as it was necessary for the court to go in making that decision, and it is submitted that it is as far as it intended to go.

3. In this case the illegal contract is purely executory—the bank is in the same situation that it would

be if it had made a contract to purchase land and had paid the consideration and had brought an action to compel a specific performance by the grantor. 65

4. The bank is in the same situation the mortgagor would be in, if, having made an otherwise valid contract with the bank to borrow $2,500 on the security of this mortgage, and having delivered his mortage to the bank, and received $1,500 of the money, he should sue for the other $1,000 If the bank can enforce the contract the other party can do so. It is not possible that the remedy, if there be one, should not be mutual.

Both parties are *in pari delicto*. If one can sue for a breach of the contract, the other can; if one can compel a specific performance the other can. It is suggested 66
that the State might discipline the bank for such a violation, but who would punish the other party to the violation of the law?

5. In Union Bank vs. Matthews, (*supra*) the controversy was one directly between the bank which made the loan upon the security of the trust deed and the party who executed that instrument, and for whose primary benefit the money was advanced, and some stress is laid, in the opinion of the Court, upon the injustice of permitting the borrower to reap the fruits of the loan and ignore his own liability to make repayment. In 67
this case at bar no such element exists. The mortgagor and original borrower is entirely outside of the case. No question arises as to any pecuniary right or interest of his in the fund in question. He does not even make an appearance in the case. The defendants in error, Bostwick's and McCormick's claim upon the fund in court rests upon their position as sureties simply of the mortgagor and principal debtor upon other and independent items of indebtedness. As such, they are entitled to a

strict construction in their favor. There is no equity, real or apparent, in favor of the bank as against them,
68 they never having received a dollar of the moneys loaned upon the faith or security of the mortgage nor had any connection with or participation in the original transaction between the mortgagor and the bank. As against a security confessedly illegal and unauthorized, their superior lien upon the fund in question would seem to be conclusively established.

6. This court, in 1829, decided this question squarely in favor of the defendants in Bank of the United States vs. Owens, (2 Peters, 527) and if it had intended to reverse that case some mention would doubtless have been made of the circumstance. This court held in that
69 case that a contract prohibited by statute is void although no penalty was attached and the law did not declare the contract void.

The law prescribed six per cent. as the legal rate of interest, but no penalty was provided. The bank loaned money at a higher rate of interest and took a note for it. This court held that the contract was void and there could be no recovery on the note.

It is submitted that until this case is reversed it is conclusive of the law of the case now before the court.

7. Suppose it were a municipal corporation that had
70 made the illegal contract instead of a business corporation. It could scarcely be said that such a violation of law would furnish the State a good reason for depriving it of its charter.

There are some general expressions in the opinion of Mr. Justice Swayne in the case of The Union National Bank vs. Matthews, which may be claimed to be broad enough to include the question now before the court. But they are to be considered in view of the fact that this question was not before the court in its present

form. The rule in such cases is stated by Chief Justice Marshall, (in Cohens vs. Virginia, 6 Wheaton, 264) as follows :—

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"It is a maxim not to be disregarded that general ex-
"pressions in every opinion are to be taken in connection
"with the case in which those expressions are used. If
"they go beyond the case, they may be respected but
"ought not to control the judgment in a subsequent suit
"where the very point is presented for decision. The
"reason of this maxim is obvious. The question actu-
"ally before the court is investigated with care, and con-
"sidered to its full extent—other principles which serve
"to illustrate it are considered in their relation to the
"case decided, but their possible bearing on all other
"cases is seldom completely investigated."

72

If these views are sustained the judgment should be affirmed.

FOURTH POINT.

The judgment of the State courts, now under review, gives the fund in court to the defendants in error. Bostwick and McCormick. The claim of McCormick to this fund is superior to that of this plaintiff in error, because McCormick's mortgage was first recorded, and this judgment should be affirmed as to McCormick without regard to the federal question in the case.

83

The enquiry in this court is limited to this federal question decided by the State court and cannot extend to other questions of which the State court has exclusive jurisdiction.

Cohens vs. Virginia, 6 Wheaton, 264, 415.

Mills vs. Brown, 16 Peters., 525.

Montgomery vs. Hernandez, 12 Wheaton, 129.

There are three claimants. Each claim is based upon

a mortgage subsequent to the mortgage upon a foreclosure of which the sale was had which produced this fund.
74 Each mortgage claims the same lien on this fund that he or it had before this sale, upon the land.

The mortgage of this plaintiff in error is first in date, and last in time of recording. It bears date January 12th, 1871, and was recorded on the 19th day of September, 1872.

The mortgage of Homer Bostwick, one of the defendants in error, is dated September 16th, 1872, and was recorded September 16th, 1872, at 12 o'clock, M., three days before the mortgage to this bank was recorded.

The mortgage to Ebenezer M. McCormick bears date September 16th, 1872, and was recorded on that day at 1 and 3-4 o'clock P. M., and three days before the mort-
75 gage to the bank was recorded.

These facts appear in the Referee's report on pp. 36 and 37 of the Record.

It further appears that Bostwick, when he took his mortgage had actual notice of the existence of the plaintiff's mortgage, (Record, page 38) and that McCormick did not have such knowledge, (Record page 38) nor did he know of the existence of the Bostwick mortgage (*id*) except that he had such constructive notice as the recording of that mortgage an hour and three-quarters before the recording of his mortgage, gave him.

Priority of registry gives Bostwick no priority over the
76 plaintiff's mortgage, because Bostwick had actual notice of that mortgage.

Berry vs. Mutual Ins. Co., 2 Johnson Ch., 603.
Jackson vs. Short, 9 Johnson, 163.

The recording of his mortgage by McCormick, he having no notice of the plaintiff's mortgages, has the effect to postpone the lien of that mortgage to the lien of the McCormick mortgage. (See cases above cited.) That being so, McCormick should be paid out of the

fund first, and before any thing is paid either to plaintiff or to Bostwick.

The amount of the McCormick mortgage is $1,500, 77
principal, to which should be added interest and the costs in the various courts.

The amount of the Bostwick mortgage is $2,500.

The amount of the plaintiff's mortgage is $5,160.10.

The federal question claimed to be in the case, therefore, only affects the defendant Bostwick, and if that question be decided in favor of the plaintiff in error, the judgment should be that McCormick's claim and the costs of the litigation be paid first, that of the plaintiff next, and that will consume the whole of the money in court.

This court will give such a judgment as the State 78
court ought to have rendered.

The judgment of the State court should be affirmed as to McCormick, in any event.

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